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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 120

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, PETITIONERS,

vs.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 1, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 28, 1940.

—1103

148 (7) That, not later than November 30, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on October 23, 1935, and, within forty-five days after the close of each calendar month thereafter, shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month.

149 All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(8) That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the Debtor, or from taking possession of, or in any way interfering with the

150 same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business by the Debtor under the orders of this Court, or from commencing or continuing any suits against the Debtor wherein any bond, except a bond for costs, may be required of the Debtor herein, either during the pendency of said proceedings or of subsequent proceedings therein by appeal or otherwise: Provided, that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.

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(9) That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the Debtor as security for its notes or obligations be and each of them hereby is restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

(10) That the Debtor hereby is directed to give notice by mailing a copy of this Order to its mortgage trustees, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date 152
of the entry of this Order once in The New Haven Journal-Courier, a newspaper published in the City of New Haven, and in The Hartford Daily Courant, a newspaper published in the City of Hartford, State of Connecticut, and in The Boston Herald, a newspaper published in the City of Boston, State of Massachusetts, and in The Wall Street Journal, a newspaper published in the City of New York, State of New York, and in The Providence Journal, a newspaper published in the City of Providence, State of Rhode Island, of a hearing to be held on November 6, 1935, at twelve o'clock noon, in the Court Room occupied by this Court in the United States Court House, 153
New Haven, Connecticut, at which hearing, or any adjournment thereof, this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof, and marked "Exhibit A".

When such mailing and publication has been completed the Debtor shall file with the Clerk of this Court its report with respect thereto.

154 *Exhibit A, Annexed to Order Approving Petitio New Haven for Reorganization.*

(11) This Court reserves full right and juris to enter at any time such further orders in the pr as the Court may deem proper, including the ri amend, extend, limit, modify, or otherwise chan rescind the present order.

Enter:

CARROLL C. HINC
District J

155 Dated:
October 23, 1935.

EXHIBIT A, ANNEXED TO ORDER APPROV PETITION OF NEW HAVEN FOR REORGANIZATION.

NOTICE TO ALL CREDITORS AND STOCKHOLDERS OF THE York, New Haven and Hartford Railroad Compa

Pursuant to an order entered October 23, 1935, by
156 Honorable Carroll C. Hincks, Judge of the District C of the United States for the District of Connecti notice is hereby given that a hearing will be held November 6, 1935, at twelve o'clock noon, by said Ju in the courtroom usually occupied by him in the Un States Court House, New Haven, Connecticut, at wh hearing the Court will, pursuant to the provisions Section 77 of the Act entitled: "An Act to establish uniform system of bankruptcy throughout the Uni States", approved July 1, 1898, and acts amendato thereof and supplementary thereto, appoint one or m

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trustees of the property of said The New York, New Haven and Hartford Railroad Company.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Dated at New Haven, Connecticut, October 23, 1935.

(c) Order Appointing Trustees for New Haven.

(Order No. 5.)

158

[SAME TITLE.]

The matter of the appointment of one or more trustees of the Debtor's property, pursuant to the requirements of the amendment of August 27, 1935 to Section 77 of the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States", as amended, having come on for hearing on November 6, 1935, and it appearing to the Court that the Debtor has given notice of this hearing as directed in its Order No. 1 of October 23, 1935, and the Court having heard the recommendations of counsel representing the Debtor and certain insurance companies and savings banks as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the Debtor and should be at minimum cost to the Debtor, and that the appointment of three trustees would best serve the interests of all parties in interest, it is ORDERED:

159

1. That Howard S. Palmer, President of the Debtor, of

160 New Haven, W. M. Daniels, of New Haven, and James Lee Loomis of Granby, both of those later named being persons who within one year prior to the date of this order have not been officers, directors, or employees, of the Debtor, any subsidiary corporation, or any holding company connected therewith, be and they hereby are appointed Trustess of the Debtor's property.

2. That the bond of each of said Trustees be and it hereby is fixed at $50,000.00, conditioned to the effect that he will well and truly perform the duties of a Trustee of
161 the Debtor's property and duly account for any moneys and properties which may come into his hands, and abide by and perform all things which he shall be directed by the Court to do.

3. That these appointments shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern.

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5. That said Trustees shall have, following said ratification and upon filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said amendatory Section 77, all of the powers of a trustee appointed pursuant to Section 44 of said Act or any other section of said Act, and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in an equity proceeding, and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided

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by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the Debtor.

6. That, following said ratification and upon the filing of such bonds, all of the property, real, personal and mixed, of every kind and nature whatsoever, of the Debtor shall by this order be vested in said Howard S. Palmer, W. M. Daniels and said James Lee Loomis, as Trustees of the Debtor's property.

7. That said Trustees shall have, following said ratification and upon filing such bonds, all the rights, privileges, powers and duties heretofore granted to or imposed upon the Debtor pursuant to said Order No. 1 of this Court and all orders supplementary thereto and amendatory thereof, and each and all of the orders heretofore entered in this proceeding shall with respect to said Trustees and the property of the Debtor, be of like force and effect as though said Trustees were therein specifically named in the place of the Debtor, all of said orders being hereby incorporated in and made a part of this order by reference.

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8. That, following said ratification and upon filing such bonds, said Trustees shall by this order have authority and power to designate employees of the Debtor to execute and deliver, in their stead and as their agents, checks, drafts, vouchers, orders, contracts, deeds, leases, easements, and any and all instruments of every kind and nature whatsoever, incidental to the operation of the property of the Debtor, and that such instruments, so executed by the agents of said Trustees, shall bind said Trustees the same as though their signatures had been affixed thereto.

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9. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein

166 as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise changing this order, and in all respects to regulate and control the conduct of said Trustees.

10. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of November 6, 1935, to the end that said Interstate Commerce Commission may
167 determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

Enter,

CARROLL C. HINCKS,
District Judge.

Dated, November 8th, 1935.

(d) Petition of Bankers Trust Company, as Trustee for Segregation Order.

168 **(Petition for Order No. 7.)**

[SAME TITLE:]

To the Honorable the Judges of the District Court of the United States for the District of Connecticut:

The petition of Bankers Trust Company, as Trustee (herein called "Petitioner") under the First and Refund-

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ing Mortgage dated December 9, 1920 (herein called the "Mortgage") and the Third Supplement thereto dated December 1, 1927, of The New York, New Haven and Hartford Railroad Company (herein called the "Debtor"), respectfully shows:

1. Petitioner has this day filed its petition for leave to intervene herein.

2. By the Mortgage, the Debtor granted, bargained, sold, released, conveyed, assigned, transferred, pledged and set over to Petitioner, as Trustee, subject as therein set forth: 170

1. The lines of railroad therein described (Granting Clause First);

2. The leasehold right, title and interest of the Debtor therein described, in and to the railroads connecting with the railroads of the Debtor (Granting Clause Second);

3. The trackage rights and other rights therein described (Granting Clause Third);

4. The terminals, piers, wharves and other property therein described, including equipment (Granting Clause Fourth); 171

5. The stocks, bonds and evidences of indebtedness therein described, owned by the Debtor (Granting Clause Fifth); and

6. Other property therein described (Granting Clause Sixth).

3. By the Third Supplement dated December 1, 1927 to said Mortgage, the Debtor granted, bargained, sold, re-

172 leased, conveyed, assigned, transferred, pledged and set over unto Petitioner, as Trustee, all of its right, title and interest in and to all the merged property of Harlem River and Port Chester Railroad Company, and of Central New England Railway Company, therein described, subject as therein set forth.

4. Article Seven of the Mortgage provides, among other things, that in case default shall be made as in the respective sections thereof set forth,

173 (1) The Trustee may forthwith enter into or upon all or any part of the mortgaged premises; may use, operate, manage and control the same; and, in such case, shall be entitled to collect and receive all tolls, earnings, income, rents, issues and profits thereof (Section 1).

(2) The Trustee may forthwith proceed to protect and enforce its rights and the rights of the holders of the Bonds and pre-existing obligations under the Mortgage by a suit or suits in equity or at law, either for the specific performance of any covenant or agreement contained in the Mortgage, or in aid 174 of the execution of any power therein granted, or for the foreclosure of the Mortgage for interest, or for principal, or both, or for the enforcement of any other appropriate legal or equitable remedy, as the Trustee shall deem most effectual in support of any of its rights or duties thereunder (Section 4).

(3) Upon filing a bill in equity or upon other commencement of judicial proceedings by the Trustee, as provided in Article Seven, to enforce any right under the Mortgage, the Trustee shall be en-

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titled to exercise any and all rights and powers conferred by the Mortgage, and, as a matter of right, the Trustee shall be entitled to the appointment of a Receiver of the mortgaged premises and of the tolls, earnings, revenue, rents, issues, profits and other income thereof, with such powers as the court making such appointment shall confer, and shall be entitled to the application by any such Receiver of the net income for the benefit of the holders of the Bonds and pre-existing obligations then secured by the Mortgage, in accordance with the trusts therein declared (Section 5).

176

5. Default has been made under the Mortgage in the respect set forth in the petition verified November 4, 1935 of Petitioner, as Trustee, for leave to intervene herein, and said default still continues. By reason of such default, Petitioner is entitled to exercise the rights and remedies specified in Article Seven of the Mortgage as exercisable upon the happening of a default.

6. Because this Court is in the possession of the mortgaged premises in these proceedings, Petitioner is unable to exercise any of the above-mentioned rights and remedies conferred upon Petitioner, as Trustee, by the Mortgage, except as this Court may grant to Petitioner in these proceedings the relief to which Petitioner is entitled.

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7. Upon information and belief:

The Mortgage covers 1,347 miles of railroad owned by the Debtor in fee, leasehold interests in 847 miles of railroad, and rights of entrance to and use of the Grand Central Station in New York City, New York. It is a

178 first lien on 435 miles, and, subject to closed mortgages securing $62,699,000 principal amount of the Bonds outstanding with the public, is expressed to be a second lien on 900 miles of the mileage owned by the Debtor. It is also a third lien on 12 miles of railroad owned by the Debtor.

The Company's main line from New York City (Woodlawn Junction) to Providence, Rhode Island, comprising a large part of the "Shore Line" route, and the main line from New Haven, Connecticut, to Springfield, Massachu-
179 setts, a total of 234 miles, is covered by the Mortgage as a direct first lien, with the exception of 62 miles on which the Mortgage is a second lien, subject only to a closed mortgage securing $1,000,000 principal amount of bonds.

8. Upon information and belief:

In the Railroad System and properties of the Debtor, of which this Court has taken jurisdiction in these proceedings, there may be comprised certain properties upon which the Mortgage is not a lien of any rank, as well as certain properties upon which, as alleged above, the Mortgage is a subordinate lien and is not a first lien. Certain
180 portions and parts of the railroad lines or other property of the Debtor are separately subject to the liens of various mortgages other than the Mortgage under which Petitioner is Trustee.

9. The security provided by the Mortgage and the Third Supplement thereto for payment of the Bonds outstanding under the Mortgage consists of not only the railroad lines, leasehold interests and other property, including equipment, securities and stocks, set forth above, but also the tolls, earnings, revenue, rents, issues, profits and other

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income derived from such lines of railroad, leasehold interests, securities and other properties. In order that the rights of Petitioner, as Trustee, and of the holders of Bonds and pre-existing obligations secured by the Mortgage and the Third Supplement thereto may be ascertained and determined, it is necessary that an account be kept of the net earnings derived from operation of the properties covered by the lien of the Mortgage and Third Supplement and of earnings covered by the lien of the Mortgage derived from other sources, and that such earnings be segregated from earnings derived from operation of other properties owned by the Debtor which are not covered by the lien of the Mortgage and Third Supplement, and from earnings derived from other sources. Furthermore, in order that the rights of Petitioner, as Trustee, and of the holders of the Bonds and pre-existing obligations secured by the Mortgage and Third Supplement may be ascertained and determined, it is necessary that the earnings derived from operation of the property upon which the Mortgage and the Third Supplement, respectively, constitute a first lien, be segregated from earning derived from operation of properties upon which the Mortgage may be a subordinate lien.

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183

10. Petitioner respectfully demands that all tolls, earnings, revenue, rents, issues, profits and other income derived from operation of properties covered by the lien of the Mortgage and the Third Supplement, and all other income covered by the lien of the Mortgage, be segregated, sequestered and impounded for the benefit of Petitioner, as Trustee, and the holders of Bonds and pre-existing obligations secured by the lien of the Mortgage and the Third Supplement thereto.

WHEREFORE, without waiving any of the rights and rem-

184 edies conferred by the Mortgage and the Third Supplement, but auxiliary thereto and in aid and furtherance thereof, Petitioner respectfully prays:

(1) that the Judge direct the Debtor, and the Trustee or Trustees of the Debtor, when appointed, to keep such records and accounts, in addition to the accounts prescribed by the Interstate Commerce Commission, as will permit of a segregation and allocation of the earnings and expenses between and to the divisions and parts of the Railroad or other property of the Debtor which are sepa-
185 rately subject to the liens of various mortgages;

(2) that the Judge determine upon a method or formula by which such segregation and allocation shall be made, and refer to the Interstate Commerce Commission for its recommendations after hearings thereon, if the parties to these proceedings shall so request and/or said Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made;

(3) that the Judge direct that such segregation and allocation be made at the expense of the Debtor's Estate;
186 and

(4) for such other and further relief which may be lawful as Petitioner may hereafter apply for and as to this Court may seem just and equitable.

Dated November 4, 1935.

BANKERS TRUST COMPANY,
as Trustee,
By R. G. PAGE,
Vice-President.

(Corporate Seal)

Petition of Rhode Island Hospital Trust Company, Trustee, for Segregation Order. 187

Attest:
W. C. MEYERS,
Assistant Secretary.

WIGGIN & DANA,
205 Church Street,
New Haven, Connecticut.

F. H. WIGGIN,

WHITE & CASE.
14 Wall Street,
New York, N. Y.
Attorneys for Petitioner. 188

FITZHUGH MCGREW,
Of Counsel.

(Verification omitted in printing.)

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e) Petition of Rhode Island Hospital Trust Company, Trustee, for Segregation Order.

(Petition for Order No. 18.)

[SAME TITLE.] 189

On December 2, 1935 Rhode Island Hospital Trust Company, as Trustee under mortgage of The Providence Terminal Company dated March 1, 1906, petitioned the District Court of the United States for the District of Connecticut for an order segregating, sequestering, impounding and holding in trust tolls, earnings, revenues, rents, issues, profits and other income

190 **(f) Petition of United States Trust Company of New York, as Trustee, for Segregation Order.**
(Petition for Order No. 29.)

[SAME TITLE.]

On December 23, 1935, United States Trust Company of New York, as Trustee of the First Mortgage of The Harlem River and Port Chester Railroad Company and The New York, New Haven and Hartford Railroad Company, dated May 16, 1904, petitioned the District Court of the United
191 States for the District of Connecticut for an order segregating and sequestering rents, issues, profits, tolls and other income of the mortgaged property for the benefit of said Trustee and the holders of the bonds secured by said mortgage.

(g) Order Upon Petitions for Segregation of Earnings.

(Orders Nos. 7, 18 and 29.)

192 [SAME TITLE.]

This cause coming on to be heard this day upon the petition for segregation of earnings verified November 4, 1935 of Bankers Trust Company, as Trustee under the First and Refunding Mortgage dated December 9, 1920 and the third supplement thereto dated December 1, 1927 of the Debtor, upon the petition for segregation of earnings verified November 29, 1935 of Rhode Island Hou-

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pital Trust Company, as Trustee under mortgage of the Providence Terminal Company dated March 1, 1906, and upon the petition for segregation of earnings verified December 20, 1935 of the United States Trust Company of New York, as Trustee under the First Mortgage of the Harlem River and Port Chester Railroad Company and The New York, New Haven and Hartford Railroad Company dated May 16, 1904, and the Court being fully advised in the premises, and no one opposing, it is

ORDERED, ADJUDGED AND DECREED:

1. That no Trustee of a mortgage covering property included in the Railroad System of the Debtor shall be 194
required to make any further demand or application for the enforcement in this proceeding of any lien or right in respect of any of the tolls, earnings, incomes, rents, issues and profits of the property covered by the mortgage, but the rights of each Mortgage Trustee shall be determined as if due demand or application had been made by such Trustee at the earliest date or dates when any such Trustee would have been entitled to make such demand or application under the terms of the mortgage of which it is Trustee, or as a matter of law; and

2. That the time of the Trustees of Debtor's estate and any other parties to these proceedings to answer the above- 195
mentioned petitions for segregation be and the same hereby is extended until further order of this Court; and

3. With respect to the prayers in the above-mentioned petitions that the Court determine, segregate and set aside in separate accounts for disposition in accordance with the rights given by the respective mortgage indentures to the Mortgage Trustees and the holders of the bonds issued

196 *Report of Mailing of Notice of Disaffirmance of Lease.*

THE COURT FINDS

That inasmuch as all of the lines of the Railway System of the Debtor are operated as a unit it is impossible to determine and allocate the earnings and income of the properties subject to the various liens unless and until a proper basis of allocation has been established by this Court and the Court reserves the right upon due notice to the parties in interest to hereafter consider, and determine this question if and as the necessities of the case may require such determination.

197 Enter,

CARROLL C. HINCKS,
District Judge.

Dated, January 17, 1936.

(h) Report of Mailing of Notice of Disaffirmance of Lease Dated February 15, 1893 from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company.

198 [SAME TITLE.]

This report of mailing dated June 2, 1936 reads in part as follows:

> "That pursuant to the authority granted in Orders No. 1 and No. 5 herein said Trustees [*i. e.*, the New Haven Trustees] have given notice to Old Colony Railroad Company of the disaffirmance and rejection of the unexpired lease dated February 15, 1893 from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad

(i) Petition of Old Colony Railroad Company for Reorganization Herein. 199

(Petition for Order No. 74.)

[SAME TITLE.]

To the Honorable the Judges of the District Court of the United States for the District of Connecticut:

The petition of Old Colony Railroad Company, a railroad corporation, with principal office at South Station, Boston, Massachusetts, respectfully shows: 200

1. That the petitioner is a railroad corporation, duly organized in 1872 by a union of Old Colony and Newport Railway Company and Cape Cod Railroad Company under the laws of the Commonwealth of Massachusetts, empowered to own, lease and operate railroads, and is a citizen and resident of said Commonwealth of Massachusetts; that it owns and is lessee of railroads in that Commonwealth and in the State of Rhode Island; that it is not a street, suburban or interurban electric railway; that the lines of railroad owned or leased by the petitioner form an important part of the system of the Debtor herein and carrier operations have been for many years conducted over said lines by the Debtor herein, which owns a majority of the capital stock of the petitioner having power to vote for the election of directors; that the terms and conditions of such operation have been as stipulated in a certain indenture (referred to hereafter as "said lease") from the petitioner to Debtor, a copy of which is attached hereto as Exhibit A. 201

2. That on October 23, 1935 the Debtor filed in this

202 *Petition of Old Colony Railroad Co. for Reorganization Herein.*

Court its petition in the above entitled proceeding under Sec. 77 of Chapter VIII of the Acts of Congress relating to bankruptcy; that on the same date this Court entered its Order No. 1 approving the Debtor's said petition as properly filed under said Section; and that thereafter this Court appointed Trustees of the property of the Debtor.

3. That since their qualification the Trustees so appointed by this Court have continued to conduct carrier operations over said lines of railroad owned or leased by
203 the petitioner.

4. That certain payments, including rentals, payments of interest on funded and unfunded debt, and payments of taxes, which heretofore became due since October 23, 1935 under said lease were made by the Debtor or said Trustees by authority of this Court; and that Order No. 1 and Order No. 17 herein were by their terms applicable to such payments.

5. That the rental due March 31, 1936 in the amount of $438,858 was not paid by the Debtor or by said Trustees; that upon a petition by said Trustees filed on April 23,
204 after notice and hearing, this Court entered an order April 28 advising said Trustees to withhold said payment until further order; that said payment is now in default and the grace period stipulated in said lease has expired; that the interest in the sum of $139,950 payable by the Debtor or said Trustees under the terms of said lease, on June 1, 1936 upon the petitioner's Series "B" 5% bonds (maturing December 1, 1945) has not been paid.

6. That on June 1, 1936, said Trustees gave formal notice to the petitioner of their disaffirmance of said lease;

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that the afore-mentioned Order No. 1 provided among other things that the Debtor might prior to April 23, 1936 disaffirm any of its existing leases and that the performance by the Debtor of any lease within such period allowed for the disaffirmance thereof should not constitute or be evidence of the adoption or assumption by the Debtor of any such lease or the waiver by it of its right to disaffirm the same; that by Order No. 56 herein the time within which any such disaffirmance might be made was extended to October 23, 1936; that Order No. 17 herein contains provisions that in case any lease should be disaffirmed or rejected by the Debtor or the Trustees of the Debtor, the operation of the leased property and any payments made [pursuant to the provisions of Order No. 1 paragraph (3) (b) herein] to comply with the obligations of the Debtor under any such lease "shall be deemed to have been made for the account of the lessors and such payments shall be recovered, set off and made and charged on the earnings and/or properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine."

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7. That the petitioner is now compelled to assume all the risks of operation of its lines of railroad and is a railroad corporation as defined in Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy.

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8. That the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation

208 is now impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are already being operated by said Trustees pursuant to the orders of this Court; that said lines and those of the Debtor are now operated as integral parts of one railway system; and the problems of operation and administration of the property of the
209 Debtor and that of the petitioner are now so closely interrelated that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court; that the petitioner approves and agrees to such operation of its property by said Trustees for the petitioner's account until further notice.

9. That on June 1, 1936 there became due interest in the amount of $139,950 on the 5% First Mortgage Gold Bonds Series "B" of the petitioner and on July 1, 1936 there will become due interest in the total amount of
210 $108,125 upon two other issues of bonds of the petitioner [viz. the 4½% First Mortgage Gold Bonds, Series "C" and the 4% Bonds due January 1, 1938]; that on June 15 there will be due $61,628.90 quarterly installment of federal income taxes of the petitioner; that on June 15 there will mature bank loans of the petitioner in the aggregate amount of $1,000,000 and on June 23 there will mature an additional bank loan of the petitioner in the amount of $400,000; that on June 30 or July 1 there will become due $100,000 and on July 1 $54,975

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Boston and Providence Railroad Corporation to the petitioner; that on August 1 there will become due interest in the amount of $96,250 upon the 5½% First Mortgage Gold Bonds Series "A" of the petitioner, and that other obligations of the petitioner in substantial amounts will fall due from time to time during the remainder of the year 1936, that the petitioner is without funds to meet and discharge the aforesaid obligations, and, on information and belief alleges that it has no means of borrowing or otherwise procuring said funds and that it is unable to meet its debts as they mature.

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10. That the petitioner desires to effect a reorganization in connection with or as a part of the plan of reorganization of the Debtor herein.

11. That a copy of this petition is this day being filed with the Interstate Commerce Commission.

12. That the filing of this petition was duly authorized by resolution of the Board of Directors of the petitioner adopted at a meeting thereof duly held June 2, 1936.

WHEREFORE, your petitioner prays

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(1) That an order may be entered approving this petition as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, that the Court take and exercise its jurisdiction over the property and affairs of the petitioner and make such orders and enter such judgments and decrees from time to time as may be proper, necessary or incidental to the reorganization of the property, debt and corporate structure of the petitioner and that it

214 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization Herein.*

granted all other and further relief to which it may be entitled.

2. That the Trustees of the property of the Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner, and to preserve such basic information and keep such records and accounts in addition to the accounts prescribed by the Interstate Commerce Commission as will permit of such a segregation and allocation as the necessities of the case may require of the earnings and expenses between said property and the remaining property under the administration of the Trustees.

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OLD COLONY RAILROAD COMPANY,
By ARTHUR P. RUSSELL
President.

Dated: June 2, 1936.

(Verified by Arthur P. Russell, as President, on June 2, 1936.)

EXHIBIT A, ANNEXED TO PETITION OF OLD COLONY RAILROAD CO. FOR REORGANIZATION HEREIN.

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LEASE BY THE OLD COLONY RAILROAD COMPANY TO THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FOR TERM OF NINETY-NINE YEARS FROM MARCH 1, 1893 DATED FEBRUARY 15, 1893

The Old Colony Railroad Company (hereinafter called the lessor), hereby demises and lets, for the term of ninety-nine years beginning the first day of March, 1893, unto The New York, New Haven and Hartford Railroad Com-

217

pany (hereinafter called the lessee), and to its successors and assigns, both the lessor and lessee being corporations existing under the laws of the Commonwealth of Massachusetts and whose roads connect with each other, all and singular its railroads and property of every description, whether within its location or not, including all rights, franchises, easements, privileges and appurtenances thereunto belonging, together with the right to demand and receive for the lessee's own use all tolls, rents, revenues, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any and all railroads operated by it, under 218
lease or otherwise, and in or to any stock and securities of other corporations owned by it, or held by, or for it, all dividends thereon, and the right of voting on the same, and in and to all contracts and obligations of or with other railroads, corporations or individuals, and all income advantages and benefits to be derived therefrom, hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, and subject to all obligations and incumbrances thereon, all its railroad, property, franchises and assets of every description, however described and wherever situated, except the corporate seal, the stockholders' and 219
directors' record books, and the transfer and stock books, to which the lessee may have access at reasonable times.

And the lessor covenants with the lessee that it will suffer and permit the lessee, it keeping all the covenants on its part as herein contained, to occupy, possess and enjoy said premises, property, rights, franchises and privileges during the term aforesaid without hindrance or molestation.

And the lessor hereby makes, constitutes and appoints the lessee its agent during the term of this lease to operate

220 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization Herein.*

all its leased railroads and property, the lessee herein to do and perform as such agent all acts with reference thereto incumbent by law or by contract upon the lessor herein and in consideration thereof to receive the income and profit arising from such operation; and the lessor hereby agrees, as soon as it legally may, to make from time to time proper and complete assignments to the lessee of all leasehold rights of the lessor.

And the lessor covenants that during the continuance of this lease it will maintain its corporate organization,
221 the lessee paying all reasonable and proper expenses thereof, and, for that purpose will hold all necessary meetings, elect all necessary officers and make all necessary records, reports, reissues of stock certificates, and transfers and registrations of bonds; and that it will, from time to time, whenever requested by the lessee, take real estate for the convenient operation of said railroads, the lessee, however, advancing therefor all damages and expenses; and that the lessee may use the lessor's name in bringing or defending any suits or proceedings so far as it is or may be necessary for the protection or enjoyment of said demised premises, property, rights, franchises and privileges, or for the acquisition of additional real estate, but
222 at the sole expense of the lessee, saving the lessor harmless from all loss, costs or damages thereby accruing.

And the lessor covenants that, for the purpose of making permanent improvements upon the property hereby demised and for the purpose of discharging its indebtedness, it will at the request of the lessee make such lawful issue, and reissue in renewal, of bonds or of stock, or both, as shall from time to time be necessary and proper to be issued; and that at the request of the lessee it will execute mortgages of said demised premises or any part thereof to secure the payment of the principal and interest

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of such bonds; and that it will not issue any stock or bonds, or create any indebtedness or lien upon said demised premises, or property, except under and in accordance with the directions, or by the previous written consent, of the lessee.

And the lessor hereby makes, constitutes and appoints the lessee its true and sufficient and lawful attorney from time to time, to bargain and sell, with the assent of the directors of the lessor, lands and structures of the lessor on such terms as to the lessee shall seem meet, and hereby authorizes the lessee in the name of the lessor to make, execute, acknowledge and deliver good and sufficient

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deeds and conveyances of all the right, title and interest of the lessor so bargained and sold in and to the same; the lessor agreeing, whenever thereto requested by the lessee, and upon reasonable notice, to affix its corporate seal to such deeds and conveyances; and the lessee covenants and agrees that other lands and structures of equal value shall be conveyed to the lessor in lieu of any lands or structures sold and conveyed, and that if the lessee shall under any power herein conferred sell or abandon the lands and structures now constituting the terminals leased to the lessor in the city of Providence, the lessee shall acquire, construct and convey to the lessor of the lessor herein new

225

terminals of equal value and sufficient for its business, and such as will conform to the agreements of the lease of the Boston and Providence Railroad Corporation to the lessor; all property so acquired to become a part of the demised premises.

And the lessor covenants that it will at any time or times hereafter upon the reasonable request of the lessee, make, and execute, or cause, or procure to be made, done and executed all and every such further and other lawful and reasonable acts, conveyances, transfers, assignments and

226 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization Herein.*

assurances in the law, for the better and more effectually vesting and confirming the premises and property hereby leased, or intended so to be, in and to the lessee, as by the lessee shall be reasonably devised, advised or required.

And the lessee covenants to pay as rent hereunder on the 30th day of June, 1893, a sum equal to a dividend of two dollars and thirty-three and one-third cents upon each share of the capital stock of the lessor then outstanding; and thereafter, except as hereinafter provided, sums equal to dividends at the rate of seven per cent per annum, pay-
227 able quarterly, upon said capital stock then from time to time outstanding.

And the lessee further covenants that as soon as it lawfully may, it will prior to January first, 1900, issue in the proportion of nine shares of its capital stock in exchange for ten shares of the capital stock of the lessor, then outstanding, and will give notice thereof by mail to each stockholder of the lessor and thereafter, and until six months after said exchange shall be offered to the stockholders of the lessor, upon the assignment to the lessee of ten shares of the capital stock of the lessor or any multiple thereof, and the surrender of the certificate or certificates therefor, the lessee will, whenever its stock transfer books
228 are open, issue to the owner of said shares in exchange therefor, a certificate for the proportionate number as above provided, of shares of the capital stock of the lessee.

And the lessee covenants that in case it shall be unable to perform the covenants contained in the preceding paragraph prior to the first day of July, 1893, it will thereafter, and between said first day of July and six months after the date when it shall be able to perform said covenants, pay (in lieu of said sums equal to dividends at the rate of seven per cent per annum) a sum on each share of the outstanding capital stock from time to time of the lessor equal

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to nine-tenths of such dividends as the lessee shall pay upon each share of its own capital stock and will secure to the stockholders of the lessor the same proportion of such pecuniary privileges as the lessee shall give upon each share of its own capital stock.

And the lessee further covenants to provide for the payment in the manner hereinbefore mentioned, of the principal of all funded indebtedness for the payment of which the lessor may be legally holden as the same shall from time to time mature, and to assume and pay all the other obligations of the lessor of every name and nature as the same shall from time to time fall due; and to keep and perform all and singular the contracts relating to said demised premises and property now in force and binding on the lessor, whether arising under leases or otherwise, and as to property leased to the lessor, the lessee shall be subject to the leases under which such property is held.

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And the lessee further covenants to pay, during each year of said term, all taxes, rates, charges and assessments, ordinary and extraordinary, which may be lawfully imposed or assessed in any way upon the lessor or lessee with reference to the premises and property hereby demised, the capital stock of the lessor, its indebtedness, franchises and revenues or said rental; said payments to be made to the authority or treasurer entitled by law to receive the same, whether Federal, State or municipal, so that said lessor shall be saved harmless, during the continuance of this lease from any tax, assessment or charge under laws or proceedings made or authorized by the United States or any State or municipality.

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Provided, that (1) if the lessee shall at any time fail to pay the interest on the lessor's bonded indebtedness when the same falls due, or (2) if the lessee shall fail for thirty

232 days to make any quarterly payment of rent as above stipulated, or (3) if the lessee shall fail to keep or perform any other of its covenants or agreements in this lease contained, and such default shall continue for six months after written notice thereof shall have been given by the lessor to the lessee; then, and in either of said events, this lease shall expire and terminate, at the option of the lessor, and the lessor may thereupon re-enter upon the demised premises, and the same have and possess as of its former estate without prejudice to its right of action for arrears
233 of rent or breach of covenant.

And the lessee covenants that it will at its own cost and expense during the continuance of this lease, furnish and provide all such books, forms and papers, and do and perform all such acts and things as may be required for the proper distribution of dividends, payment of interest and for the issue, record and transfer of the stock of the lessor, and for the issue, registration and transfer of any bonds herein referred to, as a part of the expenses of organization.

And the lessee covenants that it will operate the lessor's said railroads and the leased railroads of the lessor as required by all legal enactments from time to time in force,
234 and furnish all equipment, in addition to that hereby demised, which may be necessary for such operation, and maintain said demised premises and property during said term in good condition and up to its present standard as a railroad; and that it will make all additions, alterations, improvements and betterments which may be necessary or proper with reference to the premises and property hereby leased; and that all lands, structures, improvements, betterments and renewals so added to or made upon the real estate hereby demised shall become the property of the

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lessor, and a part of the demised premises; and that at the expiration of this lease, whether by lapse of time or otherwise, it will deliver to the lessor possession of said demised premises, and leased properties, rights, franchises and privileges, together with any and all additions and substitutions which may have been made thereto as aforesaid, and will also return or deliver, in lieu of the personal property set out in the inventory hereinafter provided to be made, the same or other personal property of similar character, value and uses, and appropriate for the operation of the lessor's railroads.

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And the lessee covenants that it will save the lessor harmless from all suits, costs, damages and expenses by reason of any act or omission of the lessee in the use of said demised premises, under this lease; and will, at its own expense, defend all suits pending or brought against the lessor and pay the judgments therein when demanded on final process; and that it will during said term make all returns required by the laws of any State, or of the United States, in relation to the property hereby leased, to any public officer, or other legal authority; and that, should any returns be required by law of the lessor the lessee will furnish, on demand, so far as it has the means, all information necessary therefor.

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And the parties hereto mutually agree that an inventory and appraisal of all the personal property hereby demised, including stocks and securities held by the lessor, shall be made as of the first day of March, 1893 by representatives of the lessor and lessee, or in case of disagreement as to any item or items by a third person to be agreed upon by the lessor and lessee.

Nothing herein contained shall prevent the lessor and lessee from modifying, changing, amending, annulling or cancelling this lease by mutual agreement.

238 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization, Herein.*

It is understood that this lease is made subject to approval by the stockholders of said parties respectively as required by law.

IN WITNESS WHEREOF, the parties hereto, under the authority and direction of their respective Boards of Directors have caused this instrument to be signed by their respective Presidents and their corporate seals to be hereto affixed, this fifteenth day of February, A. D. 1893.

239 [L. S.].

OLD COLONY RAILROAD COMPANY,
CHARLES F. CHOATE, President.

[L. S.].

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By CHARLES P. CLARK, President.

Witness:—E. G. Parker,
J. G. Parker.

240 (Verified by Charles F. Choate, as President of Old Colony Railroad Company and Charles P. Clark, President of The New York, New Haven and Hartford Railroad Company, on February 15, 1893.)

(j) Order Approving Petition of Old Colony Railroad Company for Reorganization Herein. 241

(Order No. 74.)

[SAME TITLE.]

Upon due consideration of the petition of Old Colony Railroad Company, verified June 2, 1936, and filed June 3, 1936, alleging among other things that it is a railroad corporation organized and existing under the laws of the Commonwealth of Massachusetts, owning and leasing railroads in that Commonwealth and in the State of Rhode 242
Island, that the Debtor herein owns a majority of the capital stock of the petitioner having power to vote for the election of directors; that the Trustees herein have continued since their qualification to conduct carrier operations over said lines of railroad owned or leased by the petitioner; that such operations have been carried on pursuant to orders No. 1 and No. 17 herein and are now carried on for the account of the petitioner; that the petitioner approves and agrees to the continued operation by said Trustees for its account; that the petitioner is confronted with current obligations in substantial amounts; that it is unable to meet its debts as they mature, and that the petitioner desires to effect a plan of reorganization in 243
connection with or as a part of the plan of reorganization of the Debtor herein, and the Court being satisfied that said petition complies with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy as amended, and has been filed in good faith it is ORDERED:

1. That said petition be and it hereby is approved as properly filed under such Section 77.

2. That until further order the Trustees of the property of the Debtor continue to possess and to operate the peti-

244 *Order Approving Petition of Old Colony Railroad Co., for Reorganization Herein.*

tioner's property, such operation to be for the account of the petitioner with all the powers, rights, privileges, duties and obligations with respect to said property as have been heretofore granted to and imposed upon or required of them with respect to the property of the Debtor pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and to preserve such basic information and keep such records and accounts in addition to the accounts prescribed by the Interstate Commerce Commission as will permit of such a segregation and alio-
245 cation as the necessities of the case may require between the petitioner's property and the remaining property under the administration of the Trustees.

3. That within sixty days after the entry of this order the petitioner shall file with the Clerk of this Court a statement of the assets and liabilities of petitioner as of the close of business on May 31, 1936.

4. That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, gar-
246 nisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the petitioner, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business under the orders of this Court, or from commencing or continuing any suits against the petitioner; provided, that suits or claims for damages caused by the operation of trains, busses, or other means of trans-

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portation may be filed and prosecuted to judgment in any court of competent jurisdiction.

5. That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the petitioner as security for its notes or obligations be and each of them hereby is restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

6. That the petitioner hereby is directed to give notice by mailing a copy of this order to its mortgage trustee and to cause a notice directed to its creditors and stockholders to be published within five days from the date of entry of this order once in The New Haven Journal Courier, a newspaper published in the City of New Haven, Connecticut, and in the Boston Herald, a newspaper published in the City of Boston, Massachusetts, and in the Providence Journal, a newspaper published in the City of Providence, Rhode Island, of a hearing to be held on June 18, 1936, at 2 D.S.T. o'clock in the Court Room occupied by this Court in the United States Court House, New Haven, Connecticut, at which hearing, or any adjournment thereof, the Court will appoint the present Trustees of the Debtor or some other suitable person or persons as Trustees of the property of the petitioner. The notice of such hearing shall be substantially in the form of the notice annexed hereto marked "Exhibit A". When such mailing and publication has been completed the petitioner shall file with the Clerk of this Court its report with respect thereto.

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Enter:

CARROLL C. HINCKS,
District Judge.

Dated June 2, 1936.

250 EXHIBIT A, ANNEXED TO ORDER APPROVING PETITION OF OLD COLONY RAILROAD COMPANY FOR REORGANIZATION HEREIN.

NOTICE TO ALL CREDITORS AND STOCKHOLDERS

OF

OLD COLONY RAILROAD COMPANY

Pursuant to an order entered June 3, 1936, by the Honorable Carroll C. Hincks, Judge of the District Court of the United States for the District of Connecticut, notice is hereby given that a hearing will be held on June 18,
251 1936, at 2 o'clock P.M., D.S.T., by said Judge, in the courtroom usually occupied by him in the United States Court House, New Haven, Connecticut, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act entitled: "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereof and supplementary thereto, appoint the trustees of the property of The New York, New Haven and Hartford Railroad Company, or some other suitable person or persons, as trustees of Old Colony Railroad Company.

252 OLD COLONY RAILROAD COMPANY

Dated at Boston, Massachusetts,
June 3, 1936.

(k) Order Appointing Trustees of Old Colony Railroad Company.

253

(Order No. 75.)

[SAME TITLE.]

The matter of the appointment of one or more trustees of the property of Old Colony Railroad Company, pursuant to the requirement of the amendment of August 27, 1935 to Section 77 of the Act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States", as amended, having come 254
on for hearing on June 18, 1936, and it appearing to the Court that Old Colony Railroad Company has given notice of this hearing as directed in the Court Order No. 74 of June 3, 1936, and the Court having heard the recommendations of counsel representing various parties in interest as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the continuity of operations of the railroad system of The New York, New Haven and Hartford Railroad Company as at present carried on by the trustees of that corporation and that the appointment of the Trustees of the New York, New Haven and Hart- 255
ford Railroad Company would best serve the interests of all parties in interest, it is ORDERED:

1. That Howard S. Palmer of New Haven, Connecticut, W. M. Daniels of New Haven, Connecticut, and James Lee Loomis of Granby, Connecticut, all being the Trustees of the property of The New York, New Haven and Hartford Railroad Company appointed by this Court, and each of those later named being a person who within one year prior to the date of this Order has not been an

256 officer, director, or employee of Old Colony Railroad Company, any subsidiary corporation, or any holding company connected therewith, be and they hereby are appointed Trustees of the property of Old Colony Railroad Company.

2. That the bond of each such Trustee be and it hereby is fixed at $10,000.00 conditioned to the effect that he will well and truly perform the duties of Trustee of the property of Old Colony Railroad Company and duly account for any money and property which may come into his
257 hands and abide by and perform all things which he shall be directed by the Court to do.

3. That this appointment shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern.

5. That said Trustees shall have, following the quali-
258 fication of each of them by said ratification and by filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said Section 77, as amended, all the powers of trustees appointed pursuant to Section 44 of said Act or any other section of said Act, and, to the extent not inconsistent with said Section 77, as amended, the powers of receivers in an equity proceeding, and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the

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usiness of Old Colony Railroad Company, and further,
at upon the qualification of said Trustees in the manner
foresaid, title to all of the property, real, personal and
ixed, or every kind and nature whatsoever, of Old
olony Railroad Company shall by this order be vested
said Howard S. Palmer, W. M. Daniels and James
e Loomis as Trustees of the property of Old Colony
ilroad Company.

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. That, inasmuch as the public interest and the inter-
s of Old Colony Railroad Company and of The New
rk, New Haven and Hartford Railroad Company re-
re that, until the further order of the Court, the rail-
l lines and property of Old Colony Railroad Company
perated as an integral part of the system of railroads
being administered by the Trustees of The New
k, New Haven and Hartford Railroad Company, said
stees of The New York, New Haven and Hartford
road Company, as such, be and they hereby are
ted to continue to possess and operate the properties
ld Colony Railroad Company, such operation to be
he account of Old Colony Railroad Company or the
tees of its property. In connection with such opera-
(but subject to their obligation to account to Old
y Railroad Company or to themselves as the Trus-
f its property) said Trustees shall have the following
rs:

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The power and authority to operate, maintain
epair the railroad and properties of Old Colony
ad Company, to manage its railroad business and
rry on the same through the officers, employees,
gents of the said Trustees of The New York, New
and Hartford Railroad Company; to collect the
ts, revenues, income, rents, profits, and tolls

262 accrued from its railroads and properties, and to the extent necessary to protect, preserve, and benefit its railroad or properties or business, to make and pay for additions thereto and betterments thereof.

(2) The power and authority from time to time until further order of this court to pay:

(a) all taxes and assessments due or to become due upon the properties, income, franchises, or business of Old Colony Railroad Company,

263 (b) all necessary current expenses of every description in operating the railroads and property, preserving the assets and conducting the business of Old Colony Railroad Company, including without limitation expenses of the various classifications enumerated in paragraph (3) subsections (b) (c) and (d) of Order No. 1 herein, so far as such expenses may be determined to be properly allocable to the property of Old Colony Railroad Company,

(c) such sums as may be necessary to comply with the obligations of every description of Old Colony Railroad Company under contracts or leases, but such payments shall not constitute affirmation of 264 such contracts or leases of any of them,

(d) such sums as may be necessary to maintain the corporate existence of Old Colony Railroad Company, including corporate franchise, stamp and similar taxes, the necessary expense of keeping and preserving corporate records, of maintaining transfer offices and agents, of registering and transferring its securities, and, to the extent of the liability of Old Colony Railroad Company therefor, of paying the proper charges and expenses of the trustee or trus-

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tees under any indenture or mortgage pursuant to which securities of Old Colony Railroad Company have been issued.

The Trustees of The New York, New Haven and Hartford Railroad Company are expressly authorized, in connection with their operation of the said railroad lines and property of Old Colony Railroad Company as a part of the system of lines and properties heretofore operated by them, to mingle the funds, income, assets, equipment and other properties of Old Colony Railroad Company with the other property subject to their control and, except as otherwise expressly ordered by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system, but such Trustees shall preserve (and shall make reasonably available to Old Colony Railroad Company) all such basic information, particularly with respect to the operation of the property of Old Colony Railroad Company and to the railroad system, as a whole, now operated by said Trustees, and keep such records and accounts with respect thereto, in addition to the accounts prescribed by the Interstate Commerce Commission, as will permit of such a segregation and allocation under the direction of the Court, as the necessities of the case may from time to time require, between the property of Old Colony Railroad Company and the remaining property under the administration of the Trustees, including without limitation a segregation and allocation of revenues, income, expenses, property and equipment. In connection with the operation of the railroads and properties of Old Colony Railroad Company, and without limitation of any authority granted to them by this order, the Trustees of The New York, New Haven and Hartford Railroad Company are hereby ex-

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268 pressly confirmed in the authority granted to them by Orders Nos. 24, 27, 39 and 49 in these proceedings so far as said orders may be applicable to the property of Old Colony Railroad Company.

7. That, without limitation of any powers, authority, or direction herein given to the Trustees of The New York, New Haven and Hartford Railroad Company, they are hereby specifically directed

269 (a) to pay on June 30, 1936 for the account of Old Colony Railroad Company, or of the Trustees of its property, the rent in the sum of one hundred thousand dollars ($100,000) payable on July 1, 1936 under the terms of a certain lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, and also on July 1, 1936 the sum of fifty-four thousand, two hundred and fifty dollars ($54,250), the interest then falling due under the provisions of said lease dated April 7, 1888 upon the 5% Debentures (maturing July 1, 1938) of Boston and Providence Railroad Corporation.

270 (b) to pay for the account of Old Colony Railroad Company forthwith, if the same has not been paid, the quarterly installment of federal income taxes of Old Colony Railroad Company due June 15, 1936 in the sum of sixty-one thousand six hundred and twenty-eight dollars and ninety cents ($61,628.90)

and the Trustees of The New York, New Haven and Hartford Railroad Company, either as such or as Trustees of Old Colony Railroad Company, shall not intentionally permit or make any default in the performance of the terms of any lease or executory contract to which

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Old Colony Railroad Company is a party, or in making all payments due in accordance with any such lease or executory contract, unless and except upon the advice of and with the consent of this Court previously obtained upon petition and after hearing, notice of which hearing shall have been given to all interested parties (as the Court may direct) more than twenty days prior to such hearing.

8. That, following said ratification and upon filing such bonds the said Trustees as Trustees of Old Colony Railroad Company shall by this order have authority and power to designate employees of Old Colony Railroad 272
Company or of The New York, New Haven and Hartford Railroad Company to execute and deliver in their stead and as their agents checks, drafts, vouchers, orders, contracts and any or all instruments incidental to their duties or to the operation of the property of Old Colony Railroad Company, and that such instruments, so executed by the agents of said Trustees shall bind said Trustees to the same extent as though their signatures respectively had been affixed thereto.

9. That the Trustees of Old Colony Railroad Company in their discretion, but only with the advice and consent 273
of this Court previously obtained upon petition and after hearing notice of which shall have been given to all interested parties (as the Court may direct) more than twenty days prior thereto, at any time prior to November 15, 1936, or prior to such other day as may be provided by further order of this Court, may disaffirm any of the existing contracts or leases of Old Colony Railroad Company. Such disaffirmance of any such contract or lease shall be effective when notice of such disaffirmance, together with proof of service or mailing of a copy or copies

thereof by registered mail to the other party or parties to such lease or contract shall be filed of record in this proceeding. The performance by Old Colony Railroad Company, or by the Trustees of its property, or by the Trustees of The New York, New Haven and Hartford Railroad Company for the account of Old Colony Railroad Company, of any such contract or lease within said period or further periods allowed for disaffirmance thereof shall not constitute or be evidence of the adoption or acceptance of such contract or lease by Old Colony Railroad Company or by the Trustee of its property or the
275 waiver by it or him of its or his right to disaffirm the same. In case payments are made pursuant to the authority granted to Old Colony Railroad Company or the Trustees of its property by the terms of this order, or by the terms of any other order in these proceedings, to comply with the obligations of Old Colony Railroad Company under leases or executory contracts and such leases or executory contracts shall be subsequently affirmed and adopted by Old Colony Railroad Company or by the Trustees of its property, or pursuant to a plan of reorganization, said payments shall be deemed to have been made on account of the rental or other payments due from Old Colony Railroad Company under such leases or executory contracts as the case may be. In case such leases
276 shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees of its property, or under a plan of reorganization, the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessor, and such payment shall be recovered, set-off, or made and charged, on the earnings and properties of the lessor, prior to any mortgage or other lien thereon by such method as the Court shall determine, and further reserving all rights and equities of the parties arising from such payments.

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In case any such executory contract shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees of its property or under a plan of reorganization any payment made under any such executory contract or services performed thereunder shall be the basis of such recovery, set-off, or charge against the other contracting party or parties as the Court shall determine to be proper under all the circumstances.

10. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise changing this order, and in all respects to regulate and control the conduct of said Trustees.

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11. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of June 18, 1936, to the end that said Interstate Commerce Commission may determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

Enter:

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CARROLL C. HINCKS,
District Judge.

Dated, June 18th, 1936.

280

(l) Order No. 140.

This order is dated February 24, 1937 and by it th Court relieved W. M. Daniels of his trusteeship.

(m) Order Appointing an Additional Trustee of the Property of the Principal Debtor, Old Colony Railroad Company, and Hartford and Connecticut Western Railroad Company.

(Order No. 149.)

281

[SAME TITLE.]

This order is dated March 10, 1937 and reads in part as follows:

"That Henry B. Sawyer of Boston, Mass., be and he hereby is appointed as one of the three Trustees of the property of the Principal Debtor, of Old Colony Railroad Company and of Hartford and Connecticut Western Railroad Company to succeed

282 W. M. Daniels who was relieved of further duty by Order No. 140 herein dated February 24, 1937."

(n) Report and Recommendation of the Interstate Commerce Commission as to Method or Formula for the Segregation and Allocation of Earnings and Expenses of The New York, New Haven and Hartford Railroad Company. 283

This report reads in part as follows:

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 10992
New York, New Haven and Hartford Railroad Company Reorganization

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Submitted March 4, 1938 Decided April 9, 1938

METHOD OR FORMULA FOR THE SEGREGATION AND ALLOCATION OF THE EARNINGS AND EXPENSES OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, BETWEEN AND TO ITS VARIOUS MORTGAGED AND LEASED LINES, RECOMMENDED.

* * * * * * * * *

"After considering all available data as well as the criticisms thereof, we find that the trustees' 285
method of segregation and allocation of the debtor's revenues and expenses between and to its various mortgaged and leased lines is as fair and equitable as the circumstances will permit, and so recommend to the court.

"By the Commission, division 4."

286 **(o) Order Confirming and Accepting Report of the Interstate Commerce Commission (Finance Docket No. 10992) Made April 9, 1938 on Segregation of System Earnings and Expenses.**

(Order No. 283.)

[SAME TITLE.]

These proceedings have come on further duly to be heard on May 24, 1938 upon the petition of Bankers Trust
287 Company, as Trustee, verified October 6, 1937 (Petition for Order No. 217) (Printed Record, 3263); and no exceptions having been filed to the findings and recommendation of the Interstate Commerce Commission embodied in its Report dated April 9, 1938 and filed with this Court April 15, 1938 (Printed Record, 4241); and all parties having been heard or given opportunity to be heard; Now, after due deliberation the Court, being fully advised in the premises, hereby:

FINDS, ORDERS, ADJUDGES AND DECREES:

That the findings and recommendation of the Interstate
288 Commerce Commission embodied in its Report dated April 9, 1938 and filed with this Court April 15, 1938 (Printed Record, 4241) be and they hereby are confirmed and accepted.

Dated, May 25, 1938.

ENTER:

CARROLL C. HINCKS,
District Judge.

(p) Report of Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company up to and Including December 31, 1937. 289

[SAME TITLE.]

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the Principal Debtor herein, and respectfully represent:

1. By paragraph 3, subparagraph (b) of Order No. 1 entered herein October 23, 1935, the Principal Debtor (hereinafter called the Debtor) was authorized to pay such sums as might be necessary to comply with its obligations under contracts or leases, but said Order provided that such payments should not constitute affirmations of such contracts or leases or any of them. By paragraph 4 of said Order the Debtor was authorized, at any time prior to April 23, 1936 or prior to such other date as might be provided by further order of the Court, to reject any of its existing contracts or leases, and it was ordered that the performance by the Debtor of any such contract or lease within said period or future periods allowed for rejection thereof should not constitute or be evidence of the adoption or assumption of such contract or lease by the Debtor or of the waiver by it of its right to reject the same. By subsequent orders the rights and powers granted to the Debtor by Order No. 1 were conferred upon the Trustees of its property with like force and effect as though said Trustees were therein specifically named in place of the Debtor. 290 291

2. Order No. 17, entered herein on November 30, 1935, amended Order No. 1 to provide, *inter alia*, that in case

292 payments were made pursuant to the authority granted in paragraph 3, sub-paragraph (b) of said Order No. 1, to comply with the obligations of the Debtor under leases, and such leases should be disaffirmed or rejected by the Debtor or such Trustees of its property as might thereafter qualify, or under a plan of reorganization, "the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessors, and such payments shall be recovered, set-off, or made and charged, on the earnings and or
293 properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine and further reserving all rights and equities of the parties arising from such payments."

3. By Order No. 56 the time within which leases of the Debtor might be rejected was extended to October 23, 1936.

4. On June 1, 1936 formal notice was given to Old Colony Railroad Company (hereinafter called Old Colony) of the rejection of the lease dated February 15, 1893 from Old Colony to the Debtor.

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5. On June 3, 1936 Old Colony filed its petition (No. 74) for reorganization herein, reciting the terms of the aforesaid Orders No. 1 and No. 17 with respect to the operation of leased property and to payments made under any lease subsequent to October 23, 1935, alleging as follows:

> "That the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its

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former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation on a separate basis; that said re-entry is now impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are already being operated by said Trustees 296
pursuant to the orders of this Court; that said lines and those of the Debtor are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtor and that of the petitioner are now so closely interrelated that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court; that the petitioner approves and agrees to such operation of its prop- 297
erty by said Trustees for the petitioner's account until further notice."

raying, *inter alia*, as follo

"That the Trustees of th operty of the Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner . . ."

urt by its Order No. 74, entered upon this petition, the Trustees of the property of the Debtor

298 continue to possess and operate the property of Old Colony for its account.

6. By Order No. 75 the Court appointed Trustees of the property of Old Colony, but directed the Trustees of the property of the Debtor to continue to possess and operate the properties of Old Colony, such operation to be for the account of Old Colony or the Trustees of its property. By said order the Trustees of the property of the Debtor were expressly authorized, in connection with
299 their operation of the railroad lines and property of Old Colony as a part of the system of lines and properties theretofore operated by them, to mingle the funds, income, assets, equipment and other properties of Old Colony with the other property subject to their control, and, except as otherwise expressly authorized by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system. Order No. 75 directed the Trustees of the property of the Debtor to preserve all such basic information, particularly with respect to the operation of the property of Old Colony and to the railroad system, as a whole, and to keep such records and
300 accounts with respect thereto as would permit of such a segregation and allocation under the direction of the Court as the necessities of the case might from time to time require, between the property of Old Colony and the remaining property under the administration of the Trustees of the property of the Debtor, including without limitation a segregation and allocation of revenues, income, expenses, property and equipment.

7. Order No. 75 contained provisions with respect to contracts and leases of Old Colony corresponding to the

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provisions of Orders No. 1 and No. 17 as set forth in paragraphs 1 and 2 herein.

8. By Order No. 116 herein the Court authorized and directed the Trustees of the property of Old Colony to reject the lease dated December 1, 1891 from Providence, Warren and Bristol Railroad Company (hereinafter called the Bristol) to Old Colony. On February 11, 1937 formal notice was given to the Bristol of the rejection of said lease.

9. On February 12, 1937 the Bristol filed its petition (No. 138) for reorganization herein, reciting the terms of the aforesaid Orders No. 1, No. 17 and No. 75 with respect to the operation of leased property and to payments made under any lease subsequent to October 23, 1935, alleging as follows:

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"That After default the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation on a separate basis; that said re-entry is impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are being operated by said Trustees pursuant to the orders of this Court; that said lines

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304 and those of the Debtors herein are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtors and that of the petitioner are now so closely inter-related that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtors herein or the further order of this Court; that the 305 petitioner approves and agrees to such operation of its property by said Trustees for the petitioner's account until further notice."

and praying, *inter alia*, as follows:

"That the Trustees of the property of the Principal Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner . . . ."

The Court by its Order No. 138, entered upon this petition, ordered the Trustees of the property of the Debtor 306 to continue to possess and operate the property of the Bristol for its account.

10. By Order No. 150 the Court appointed Trustees of the property of the Bristol, but directed the Trustees of the property of the Debtor to continue to possess and operate the properties of the Bristol, such operation to be for the account of the Bristol or the Trustees of its property. By said order the Trustees of the property of the Debtor were expressly authorized, in connection with their operation of the railroad lines and property of the

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Bristol as a part of the system of lines and properties theretofore operated by them, to mingle the funds, income, assets, equipment and other properties of the Bristol with the other property subject to their control, and, except as otherwise expressly authorized by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system. Said Order No. 150 directed the Trustees of the property of the Debtor to preserve all such basic information, particularly with respect to the operation of the property of the Bristol and to the railroad system as a whole, and to keep such records and accounts with respect thereto as would permit of such a segregation and allocation under the direction of the Court as the necessities of the case might from time to time require, between the property of the Bristol and the remaining property under the administration of the Trustees of the Debtor, including without limitations a segregation and allocation of revenues, income, expenses, property and equipment.

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11. The Debtor and the Trustees of its property have continued to operate the properties of the aforesaid subsidiary debtors for their account, as directed by the aforesaid orders, have made certain capital expenditures upon said properties, and have made certain tax and other payments as authorized by this Court, including payments under the leases from Boston and Providence Railroad Corporation to Old Colony, dated April 7, 1888, and from the Bristol to Old Colony, dated December 1, 1891.

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12. Pursuant to the suggestion of the Court at the continued hearing on Petition for Order No. 217, on December 23, 1937, petitioners have prepared accounts of their

administration of the properties of said subsidiary debtors from October 23, 1935 up to and including December 31, 1937, which said accounts are hereto annexed, made a part hereof, and marked Exhibits 1 and 2, the former consisting of a Summary of Accounts covering Administration of the Property of Old Colony Railroad Company (with statements marked A, B and C attached) the latter consisting of a Summary of Accounts covering Administration of the Property of Providence, Warren & Bristol Railroad Company (with statement marked A attached).

311 Said exhibits have been prepared from records and accounts prepared and kept by petitioners pursuant to orders herein.

13. The charges stated in said accounts for sums paid to or for the account of Old Colony, prior to rejection of leases, for the expenditures for additions and betterments, and the net credits for property retired and not replaced are drawn from the current accounts of petitioners. The revenues and expenses of operation of the properties from June 1, 1936 to December 31, 1937 have been credited or charged, as the case may be, on the basis of the formula referred to the Interstate Commerce Commission

312 by Order of Reference on Petition for Order No. 217, herein, and approved by the Commission's report and recommendation dated April 9, 1938. Expenses for the period prior to June 1, 1936 have been charged on the basis of said formula. Because of the time required and the expense to the estates of the several debtors that would be incurred in examining all waybills and passenger collections for the period prior to June 1, 1936, revenues for that period have been credited on the basis of tests and averages which petitioners believe reasonably approxi-

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ate the result of applying the formula to revenues for hat period.

WHEREFORE, petitioners pray that the Court approve he accounts and order that the amounts stated therein onstitute a charge on the earnings and/or properties said subsidiary debtors prior to any mortgage or other en thereon as expenses of administration and may be covered out of the earnings and/or properties of Old olony Railroad Company and Providence, Warren and istol Railroad Company by such method as the Court all hereafter determine, said accounts to be subject to h adjustments as the Court may hereafter order.

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Dated, April 19, 1938.

H. S. PALMER
JAMES LEE LOOMIS
HENRY B. SAWYER.
Trustees.

(Verification omitted in printing.)

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EXHIBIT 1, ANNEXED TO REPORT OF ADMINISTRATION OF PROPERTY, ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

IE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

RY OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF OLD COLONY RAILROAD COMPANY

		Old Colony.	Boston & Providence	Providence Warren & Bristol	Total
Under Lease Obligations	(Statement A)	$ 817,157	$1,178,000	$ 27,533	$ 2,022,690
Expenditures (Net)	(Statement B)	38,577	117,295	35	155,907
Total Expenditures		855,734	1,295,295	27,568	2,178,597
g Deficits	(Statement C)	4,419,179	1,896,981	96,098	6,412,258
Total including Operating Deficits		5,274,913	3,192,276	123,666	8,590,855
for handling Company Coal and Interest avestment in Equipment and Other Facilities not included in above Operating Deficits	(Statement C)	500,737	2,269,175	33,755	2,803,667
GRAND TOTAL		$5,775,650	$5,461,451	$ 157,421	$11,394,522

olony and Boston & Providence for period October 24, 1935 to December 31, 1937.

dence, Warren & Bristol for period October 24, 1935 to June 3, 1936.

(Statements A, B and C omitted in printing)

EXHIBIT 2, ANNEXED TO REPORT OF ADMINISTRATION OF PROPERTY, ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

HE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

Y OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF PROVIDENCE, WARREN & BRISTOL RAILROAD COMPANY FOR THE PERIOD JUNE 4, 1936 TO DECEMBER 31, 1937.

UNDER LEASE OBLIGATIONS:

Date Paid	Detail	Period Covered	Amount
June 29, 1936	Dividend on 1,500 shares Preferred and 7,246 shares Common @ 6%	7-1-35—12-31-35	$ 26,238.00

XPENDITURES:

A. F. E. No.	Location	Description	Gross Expenses	Operating Expense Ledger Value Retirement	
30918	P. W. & B. Branch	1937 Rail Program	$ 5,876.13		5,876.13
ial Expenditures					5,876.13
Deficits (Statement A)					32,114.13
					277,986.45
al including Operating Deficits					309,200.58
handling Company Coal and Interest					
stment in Equipment and Other Facili-					
included in above Operating Deficits					
ent A)					85,314.64
ND TOTAL					$394,515.22

Conn.
38.

(Statement A omitted in printing)

322 **(q) Order on Trustees' Report of Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company up to and Including December 31, 1937.**

(Order No. 300.)

[SAME TITLE.]

The Trustees of the property of the Principal Debtor herein having filed a report dated April 19, 1938 of their administration of the property of Old Colony Railroad
323 Company and of Providence, Warren and Bristol Railroad Company from October 23, 1935, when these proceedings were instituted, up to and including December 31, 1937, and said report having come on for hearing duly noticed and the Court having considered the facts and arguments presented and having issued its Memorandum of Decision dated July 2, 1938, and the Court upon petition of Boston and Providence Railroad Corporation having, on July 15, 1938, reopened the record of fact and said Boston and Providence Railroad Corporation, said Trustees, and the Trustee under The New England Railroad Company Consolidated Mortgage
324 having presented additional evidence and having been heard upon questions relating to the methods employed by the Trustees of the property of the Principal Debtor in determining the rights of the Boston and Providence, under the provisions of Order No. 221 herein, in certain freight facilities in Boston and vicinity, and due notice of the settlement of this order having been given, it is

ORDERED, ADJUDGED AND DECREED:

1. That the accounts as stated in said report be and they hereby are approved in the amount of $11,789.

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37.22, viz.: (a) $5,775,650, covering administration f the property of Old Colony Railroad Company for the eriod October 24, 1935 to December 31, 1937 (both ates inclusive); (b) $5,461,451, covering administra- ion of the property of Boston and Providence Railroad Corporation for the same period; and (c) $551,936.22, overing administrat of the property of Providence, Warren and Bristol road Company for the same eriod.

2. That $11,237,401.22 of said amount be and it hereby 326
onstitutes a lien, charge or claim on the earnings and roperty of Old Colony Railroad Company as an expense f administration prior to any mortgage or other lien hereon and to any other indebtedness of said Company, nd may be recovered by the Trustees of the property of he Principal Debtor herein out of the earnings or property f said Old Colony Railroad Company by such method as he Court shall hereafter determine.

3. That the incidence of the $551,936.22 for administra- ion of the property of Providence, Warren and Bristol Railroad Company be and it hereby is reserved for later determination. 327

4. That the question of interest upon said amounts be nd it hereby is reserved for later determination.

Enter.

C. C. HINCKS,
District Judge.

Dated; July 18th, 1938.

328 **(r) Order on Petition of Bankers Trust Company, as Trustee, for Order No. 217.**

(Order No. 217.)

[SAME TITLE.]

These proceedings having come on further duly to be heard on May 24 and 25 and June 2, 1938 upon the petition of Bankers Trust Company, as Trustee, verified October 6, 1937 (Petition for Order No. 217) (R. p. 3263), and upon all relevant pleadings or other papers filed or
329 orders entered or other proceedings had or taken with regard thereto, including (without limiting the generality of the foregoing) the method or formula embodied in a volume prepared by the Trustees of the property of the Principal Debtor entitled "New York, New Haven and Hartford Railroad Segregation of Earnings" (herein called the "Formula"), the order of reference dated October 29, 1937 entitled "Order of Reference to Interstate Commerce Commission for its Recommendation as to the Method or Formula by which Earnings of the Railroad System shall be Segregated and Allocated" (R. p. 3587), the Report of the Commission made April 9, 1938 and
330 filed with this Court on April 15, 1938 (R. p. 4241), the answer dated May 3, 1938 of the Trustees of the property of the Principal Debtor and the Trustees of the property of Old Colony Railroad Company recommending "that they be authorized and directed (a) to withhold any and all payments due or to become due under the terms of the Lease dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company and (b) to reject said Lease" (R. p. 4309), and the order of the Court heretofore entered approving and adopting the Formula and the Report of the Interstate Commerce Com-

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mission with respect thereto (R. p. 4241); and all parties having been heard or given opportunity to be heard; and the Court having entered its Decision dated July 2, 1938 entitled "Memorandum of Decision on Petition for Order No. 217 and the Trustees' Answer Thereto" (R. p. 4497); and Boston and Providence Railroad Corporation having on July 8, 1938 filed its Petition for Order No. 296 to reopen the record of fact herein, which petition was not pressed and was orally denied without exception at a hearing on July 15, 1938;

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Now, after due deliberation, the Court being fully advised in the premises, hereby:

ORDERS, ADJUDGES AND DECREES:

1. The Trustees of the property of Old Colony Railroad Company (herein called the "Old Colony Trustees") shall forthwith disaffirm and reject the Lease dated April 7, 1888 from Boston and Providence Railroad Corporation (herein called the "Boston and Providence") to Old Colony Railroad Company (herein called the "Old Colony"). Notice of such disaffirmance and rejection shall be sufficient if sent by United States registered mail in a 333
securely sealed postpaid wrapper addressed to the Boston and Providence, c/o Bentley W. Warren, Esq., at 30 State Street, Boston, Massachusetts.

2. Promptly after mailing such notice, the Old Colony Trustees shall file with this Court a Report of such mailing.

3. Neither the Old Colony Trustees shall make, nor the Trustees of the property of the Principal Debtor

334 (herein called the "New Haven Trustees") shall make for the account of the Old Colony or of the Old Colony Trustees, any further payments under the terms of the Lease dated April 7, 1888 from the Boston and Providence to the Old Colony; nor shall the estate of the Principal Debtor be subjected to further outlay on account of said Lease.

4. If and to the extent that any provisions contained in Order No. 75 (R. p. 817) or any provisions contained
335 in any other orders entered herein prior to the date of this order are inconsistent with the foregoing provisions of this order, such inconsistent provisions are terminated.

5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for
336 the account of the Old Colony estate but without expense to the New Haven estate.

The Court reserves for further hearing the right to determine the existence and amount of any obligation of Boston and Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston and Providence therefor to the Old Colony estate and by way of subrogation to the New Haven estate. And pend-

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g such determination the Court will withhold its final
ling on Petition for Order No. 276.

Enter,

C. C. HINCKS,
District Judge.

ated: July 19th, 1938.

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) Report of Mailing of Notice of Rejection of Lease Dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company.

This report of mailing dated July 19, 1938 reads in part follows:

"That pursuant to authority granted in Order No. 217 herein, said Trustees [i. e. the Old Colony Trustees] have given notice to Boston and Providence Railroad Corporation of the rejection of the unexpired lease dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company."

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340 **(t) Petition of Trustees for a Charge Upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936 to December 31, 1937.**

(Petition for Order No. 301.)

[SAME TITLE.]

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the Principal Debtor (hereinafter sometimes called "the New
341 Haven Trustees") and of Old Colony Railroad Company (hereinafter sometimes called "the Old Colony Trustees"), and respectfully represent:

1. By Order No. 74 entered herein June 3, 1936, the petition of Old Colony Railroad Company for reorganization herein was approved and the New Haven Trustees were ordered until further order to continue to operate the property of said Old Colony Railroad Company for its account.

2. By paragraph 2, subparagraph (c), of Order No. 75 entered herein June 18, 1936 said New Haven Trus-
342 tees were empowered and authorized to pay such sums as might be necessary to comply with the obligations of Old Colony Railroad Company under contracts or leases, but that such payments should not constitute affirmation of such contracts or leases or any of them, and by paragraph 7 of said Order it was provided that said Trustees, either as such or as Old Colony Trustees, should not intentionally make or permit any default in the performance of any contract or lease to which Old Colony Railroad Company was a party unless and except upon the advice and with the consent of the Court previously obtained

Petition of Trustees for a Charge Upon the Earnings and Property of Boston and Providence Railroad Corp., etc. 343

fter hearing duly noticed. By paragraph 9 of said Order
he Old Colony Trustees were authorized at any time
rior to November 15, 1936 or prior to such other day
s might be provided by further order of the Court, and
ith the advice and consent of the Court after hearing
ly noticed, to reject any of the existing contracts or
ases of said Old Colony Railroad Company; and it was
rther provided in said paragraph 9 that the perform-
nce by Old Colony Railroad Company, by the Old Colony
rustees or by the New Haven Trustees for the account
Old Colony Railroad Company, of any such contract 344
lease within said period or future periods allowed for
jection should not constitute or be evidence of the
doption or acceptance of such contract or lease by Old
olony Railroad Company or by the Old Colony Trus-
es, or the waiver of the right to disaffirm or reject the
me, and that in case payments were made pursuant to
he authority granted by the terms of said order or of
ny other order in the proceeding, to comply with the
bligations of said Old Colony Railroad Company under
ases and such leases should be subsequently disaffirmed
rejected by Old Colony Railroad Company or by the
ld Colony Trustees or under a plan of reorganization,
the operation of the leased properties shall have been 345
nd said payments shall be deemed to have been made
r the account of the lessor, and such payment shall be
ecovered, set-off, or made and charged, on the earnings
nd properties of the lessor, prior to any mortgage or
her lien thereon by such method as the Court shall
etermine, and further reserving all rights and equities
f the parties arising from such payments." Boston and
rovidence Railroad Corporation, its officers, agents and
ounsel have had knowledge of the said terms of Order
o. 75 continuously since its entry.

346 3. By Orders No. 97, 125, 148, 167, 198, 205, 213, and 221A the time within which leases of Old Colony Railroad Company might be rejected was extended from time to time, the last of said orders, entered October 27, 1937, extending the time until further order of the Court. Boston and Providence Railroad Corporation, its officers, agents and counsel have had knowledge of the terms of said orders continuously since their entry.

4. By Order No. 267 the Court after hearing duly noticed, granted the petition of the petitioners herein to
347 permit postponement of the payment due April 1, 1938 under the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, during the grace period of thirty days stipulated in said lease. By Order No. 271, upon petition of the petitioners herein alleging that they had received assurances from the President of Boston and Providence Railroad Corporation that prior to the expiration of said grace period the Board of Directors of said Corporation would authorize him to agree with Old Colony Railroad Company and the Old Colony Trustees that if said payment due April 1, 1938 was not made within said grace
348 period said Corporation would not claim any right of reentry or of forfeiture of said lease prior to June 1, 1938, the Court, after notice and hearing, permitted further postponement until June 1, 1938 of said payment due April 1, 1938. By Order No. 284 upon oral motion in open Court of counsel for petitioners herein at the hearing May 25, 1938 upon Petition for Order No. 217 and upon assurance from the President of Boston and Providence that said Corporation had consented to claim no right of reentry or forfeiture prior to July 1, 1938 for delay in the payment due April 1, 1938, the Court permitted

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ther postponement until July 1, 1938 of said payment. Order No. 292 the Court authorized and directed the itioners herein to withhold any and all payments due to become due under the aforesaid lease pending entry the Court's order upon Petition for Order No. 217.

. By Order No. 217, entered herein on July 19, 1938, Court ordered the Old Colony Trustees forthwith to ect the lease dated April 7, 1888 from Boston and ovidence Railroad Corporation to Old Colony Railroad npany.

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. Pursuant to said Order No. 217 said Old Colony ustees mailed on July 19, 1938 to Boston and Provi- ce Railroad Corporation notice of their rejection of l lease, and on the same day said Trustees filed with s Court a report of such mailing.

. By Order No. 300, entered herein on July 18, 1938, Court approved the New Haven Trustees' report ed April 19, 1938 of administration of property of Old ony Railroad Company from October 23, 1935 when se proceedings were instituted up to and including cember 31, 1937, and ordered that the amount of ,237,101.22 constitutes a charge on the earnings and perty of Old Colony Railroad Company as an expense administration prior to any mortgage or other lien reon and to any other indebtedness of said Company may be recovered by the New Haven Trustees out the earnings or property of said Old Colony Railroad npany by such method as the Court shall hereafter ermine.

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. Said amount included $3,955,298.93 covering pay- nts made under the aforesaid lease and expenditures

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incurred in administration of property of Boston and Providence Railroad Corporation during the period June 4, 1936 to December 31, 1937 (both dates inclusive), as follows:

Payments under lease obligations	$ 922,250.00
Net capital expenditures	56,824.31
Operating deficits	1,355,565.40
Charges for handling company coal and interest on investment in equipment and other facilities	1,620,659.22
Total	$3,955,298.93

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9. The detail making up said $3,955,298.93 is as shown on Old Colony Exhibit #2 introduced at the hearing May 24, 1938 upon the aforesaid report of the New Haven Trustees dated April 19, 1938, copy of the pertinent parts of which exhibit is hereto annexed marked Exhibit A and made a part hereof.

10. Petitioners propose to submit their report of administration of the property of Boston and Providence Railroad Corporation during the period January 1, 1938 to the date of rejection as soon as the figures are available.

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WHEREFORE, petitioners pray that the Court approve said account against the Boston and Providence Railroad Corporation for the period June 4, 1936 to December 31, 1937, and order that said $3,955,298.93 with such interest thereon as is later determined to be payable constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation in the possession of this Court prior to any mortgage or other lien, charge

said Company as an expense of administration of said property of said Company by the Trustees of the property of the Principal Debtor herein on behalf and for the account of the Trustees of the property of Old Colony Railroad Company, and may be recovered by said Trustees of the property of Old Colony Railroad Company or, in the alternative, by the Trustees of the property of the Principal Debtor out of the earnings and property of said Boston and Providence Railroad Corporation by such method as the Court shall hereafter determine, and that to the extent that said amount is so recovered by said Trustees of the property of the Principal Debtor the like charge against the earnings and property of Old Colony Railroad Company heretofore allowed by Order No. 300 shall be correspondingly reduced, and that the Court reserve for later determination the amount of like charges covering administration of the property of said Boston and Providence Railroad Corporation from January 1, 1938 to the date of rejection of the aforesaid lease.

Dated: July 27, 1938.

H. S. PALMER
JAMES LEE LOOMIS
HENRY B. SAWYER
Trustees.

W. W. MEYER,
Counsel for Trustees.

(Verification omitted in printing.)

EXHIBIT A, ANNEXED TO PETITION OF TRUSTEES, ETC.

Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees of the property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, and of OLD COLONY RAILROAD COMPANY, DEBTOR.

EXCERPTS FROM OLD COLONY EXHIBIT #2 DATED MAY 17, 1938 FILED AT HEARING ON TRUSTEES' REPORT OF ADMINISTRATION OF OLD COLONY RAILROAD—MAY 24, 1938.

Statement of Payments made by Trustees to comply with Obligations under Lease dated February 15, 1893 from Old Colony Railroad Company to The New York, New Haven & Hartford Railroad Company.

BOSTON & PROVIDENCE RAILROAD CORPORATION LEASE dated April 7, 1888 to Old Colony Railroad Company

FOR THE PERIOD JUNE 4, 1936 TO DECEMBER 31, 1937

Detail				Period Covered			Gross Amount
Div. on	40,000	shares	stock @ 10%	4–1–36	—	6–30–36	$100,000.00
" "	40,000	"	" " 10%	7–1–36	—	9–30–36	100,000.00
" "	40,000	"	" " 10%	10–1–36	—	12–31–36	100,000.00
" "	40,000	"	" " 10%	1–1–37	—	3–31–37	100,000.00
" "	40,000	"	" " 10%	4–1–37	—	6–30–37	100,000.00
" "	40,000	"	" " 10%	7–1–37	—	9–30–37	100,000.00
" "	40,000	"	" " 10%	10–1–37	—	12–31–37	100,000.00
Int. on	$2,170,000	5%	Debs. due 1938	1–1–36	—	6–30–36	54,250.00
" "	$2,170,000	5%	" " 1938	7–1–36	—	12–31–36	54,250.00
" "	$2,170,000	5%	" " 1938	1–1–37	—	6–30–37	54,250.00
" "	$2,170,000	5%	" " 1938	7–1–37	—	12–31–37	54,250.00
Miscellaneous Organization Expenses				12–31–35	—	12–31–37	5,250.00
Total June 4, 1936 to December 31, 1937							$922,250.00

Summary of Net Capital Expenditures and of Net Salvage

361

BOSTON AND PROVIDENCE

June 4, 1936 to December 31, 1937

Net Capital Expenditures	$63,743.39
Net Salvage Credits	6,919.08
Net Balance due for Capital Expenditures	$56,824.31

New Haven, Conn.
May 17, 1938.

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Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees of the property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, and of OLD COLONY RAILROAD COMPANY, DEBTOR.

EXCERPTS FROM OLD COLONY EXHIBIT #2 DATED MAY 17, 1938 FILED AT HEARING ON TRUSTEES REPORT OF ADMINISTRATION OF OLD COLONY RAILROAD— MAY 24, 1938.

Statement of Revenues and Expenses of Operating the Property of Boston and Providence Railroad Corporation.

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	Total June 4, 1936 to December 31, 1937
Operating Revenues:	
Freight	$ 5,433,804.05
Passenger	4,141,004.18
Other	1,841,468.50
Total Operating Revenues	$11,416,276.73
Operating Expenses:	
Maintenance of Way and Structures	1,304,892.59

364	Miscellaneous Operations	271,255.33
	General	493,471.2[illegible]
	Transportation for Investment—Cr.	* 355.22
	Total Operating Expenses	$10,301,122.79
	Net Revenue from Railway Operations	$ 1,115,153.94
	Railway Tax Accruals	$ 1,390,252.31
	Hire of Freight Cars—Dr. Balance	372,281.23
	Other Equipment Rents—Net Dr.	43,741.80
	Joint Facility Rents—Net Dr.	670,578.17
365	Net Railway Operating Income #	1,361,699.57

* Credit
\# Deficit

	Non-Operating Income	$ 232,207.54
	Gross Income #	1,129,492.03
	Deductions from Gross Income	226,073.37
	Net Income #	$ 1,355,565.40
366	Intra System Items:	
	Handling Company Coal	$ 129,635.97
	Interest on Investment in Equipment	281,613.57
	Interest on Investment in Facilities	1,209,409.68
	Total Intra System Items	$ 1,620,659.22
	TOTAL DEFICIT INCLUDING INTRA SYSTEM ITEMS	$ 2,976,224.62

\# Deficit

(u) Order on Petition of the Trustees for a Charge Upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936 to December 31, 1937. 367

(Order No. 301.)

[SAME TITLE.]

The petition of the Trustees of the property of the Principal Debtor and of Old Colony Railroad Company for a charge upon the earnings and property of Boston and Providence Railroad Corporation for administration for the period June 4, 1936 to December 31, 1937, both dates inclusive, having come on for final hearing which was duly noticed, Bentley W. Warren and Charles W. Mulcahy as the Trustees of the property of Boston and Providence Railroad Corporation having filed their objections thereto dated March 11, 1939, all parties having been heard or given opportunity to be heard, and the Court being duly advised in the premises FINDS: 368

That the facts alleged in said petition are true, and it is 369

ORDERED, ADJUDGED AND DECREED:

(1) That the accounts as stated in said petition be and they hereby are approved in the amount of $3,955,298.93, for the period June 4, 1936 to December 31, 1937 (both dates inclusive); subject, however, to adjustment to be reflected in the accounts for succeeding periods, with respect to items stated in the approved account on an accrual basis and subsequently liquidated.

370 *Petition of The Provident Institution for Savings in the Town of Boston, Creditor, for Reorganization of the Boston and Providence Railroad Corporation.*

(2) That said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Boston and Providence Railroad Corporation, prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Corporation, in favor of the Trustees of the property of the Principal Debtor herein; provided, however, that if and to the extent that said lien and charge shall be satisfied from the estate of Boston and Providence Railroad Corporation, the lien
371 and charge imposed upon the estate of the Old Colony Railroad Company under Order No. 300 herein, shall be correspondingly reduced.

(3) That the question of interest upon the amount of the charge imposed by paragraph (2) hereof be and it hereby is reserved for later determination.

Enter:

C. C. HINCKS,
District Judge.

Dated, April 20, 1939.

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(v) Petition of The Provident Institution for Savings in the Town of Boston, Creditor, for Reorganization of the Boston and Providence Railroad Corporation.

On August 4, 1938, The Provident Institution for Savings in the Town of Boston, a creditor, petitioned the District Court of the United States for the District of Massachusetts for reorganization of the Boston and Providence

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Railroad Corporation under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy. The petition recited inter alia that the Boston & Providence lease to Old Colony had been rejected and that the United States Court for the District of Connecticut had ordered, pending its further order, the operation of the property of the Boston and Providence should be continued by the New Haven Trustees for the account of the Boston and Providence.

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(w) Answer of Boston and Providence Railroad Corporation to Petition of The Provident Institution for Savings in the Town of Boston, Creditor.

On August 4, 1938 Boston and Providence Railroad Corporation filed its answer to the petition of The Provident Institution for Savings in the Town of Boston, Creditor, admitting the principal allegations contained in said petition.

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376 **(x) Order Approving Petition of The Provident Institution for Savings in the Town of Boston, Creditor, for Reorganization Herein of Boston and Providence Railroad Corporation.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

No. 62413.

377

In the Matter

of

BOSTON AND PROVIDENCE RAILROAD CORPORATION,

Debtor.

Upon due consideration of the petition of The Provident Institution for Savings in The Town of Boston, verified August 3, 1938, and filed August 4, 1938, alleging among other things that Boston and Providence Railroad Corporation is a railroad corporation organized and existing
378 under the laws of the States of Massachusetts and Rhode Island, and is a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in those states, with its principal executive office in the City of Boston, in the District of Massachusetts; that Boston and Providence Railroad Corporation is confronted with indebtedness in substantial amounts, and is unable to meet its debts as they mature, and that Petitioner as a creditor, having claims aggregating not less than five (5) per centum of all the indebtedness of said Railroad Corporation, as shown in the latest annual report

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filed with the Interstate Commerce Commission, proposes that said Railroad Corporation shall effect a reorganization herein; and the Boston and Providence Railroad Corporation, having made and filed its answer to such petition, admitting the jurisdiction of this Court and the material allegations of the petition, and the Court being satisfied that said petition complies with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy as amended, and has been filed in good faith, it is

ORDERED:

1. That said petition be, and it hereby is, approved as properly filed under such Section 77.

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2. That until further order, all persons, firms and corporations, whatsoever, and wherever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor, Boston and Providence Railroad Corporation, or from interfering in any manner with the present operation of its railroad or properties or the carrying on of its business until the further order or orders of this Court.

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3. That the Debtor, Boston and Providence Railroad Corporation, hereby is directed to cause a notice, directed to its creditors and stockholders, to be published within five (5) days from the date of entry of this order once in the Boston Herald and in the Boston Post, newspapers published in the City of Boston, Massachusetts, and once

Exhibit A, Annexed to Order Approving Petition of The Provident Institution, etc.

382 in the Providence Journal, a newspaper published in the City of Providence, Rhode Island, of a hearing to be held on August 22, 1938, at 11 o'clock, A. M., D. S. T., in the Court Room in the Federal Post Office Building, Post Office Square, Boston, Massachusetts, at which hearing, or any adjournment thereof, this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof, and marked "Exhibit A". When such publication has been completed, 383 the Debtor shall file with the Clerk of this Court its report with respect thereto.

WITNESS the Honorable Francis J. W. Ford, Judge of the said court, and the seal thereof, at Boston, in said district, on this fifth day of August, 1938.

ARTHUR M. BROWN,
Deputy Clerk.

August 5, 1938.

F. J. W. F.,
D. J.

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384 EXHIBIT A, ANNEXED TO ORDER APPROVING PETITION OF THE PROVIDENT INSTITUTION, ETC.

NOTICE TO ALL CREDITORS AND STOCKHOLDERS

OF

BOSTON AND PROVIDENCE RAILROAD CORPORATION.

Pursuant to an order entered August 5, 1938, by the Honorable Francis J. W. Ford, Judge of the District Court

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of the United States for the District of Massachusetts, notice is hereby given that a hearing will be held on August 22, 1938, at 11 o'clock, A. M. D. S. T., by said Judge, in the courtroom in the Federal Post Office Building, Post Office Square, Boston, Massachusetts, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act, entitled, "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1938, and acts amendatory thereof and supplementary thereto, appoint one or more trustees of the property of said Boston and Providence Railroad Corporation.

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BOSTON AND PROVIDENCE
RAILROAD CORPORATION.

Dated at Boston, Massachusetts,
August , 1938.

(y) Lease, Dated April 7, 1888, from Boston and Providence Railroad Corporation to Old Colony Railroad Company.

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THIS INDENTURE, made this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-eight, by and between the BOSTON AND PROVIDENCE RAILROAD CORPORATION, party of the first part, hereinafter called the lessor, and the OLD COLONY RAILROAD COMPANY, party of the second part, hereinafter called the lessee, both parties being corporations created by the laws of Massachusetts,

WITNESSETH: That the said parties, each for itself, its

388 ***Lease Dated April 7, 1888 From Boston and Providence Railroad Corp. to Old Colony Railroad Co.***

grants, covenants and agreements herein made by the other, have granted, covenanted and agreed, and do hereby GRANT, COVENANT AND AGREE, each to and with the other, and its successors and assigns, as follows, to wit:—

First. The lessor doth grant, demise and lease unto the lessee, its successors and assigns, all its railroad and property of every description, including therein its railroad, lands and wharves, branches, tracks, side-tracks, road-beds, superstructure, station houses, depot grounds, 389 depots, viaducts, bridges, piers, shops, buildings and fixtures, whether within its location or not, and also its engines, cars, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus, equipment, and all rights, franchises, easements, privileges and appurtenances thereunto belonging, together with the right to demand and receive all tolls, rents, revenue, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any and all railroads operated by it, under lease or otherwise, and in or to any stock of other corporations owned by it, or held for it, all dividends thereon, and the right of voting on the same, and in and to all contracts and obligations of or with other 390 railroads, corporations or individuals, and all income advantages and benefits to be derived therefrom, hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, all its railroad, railroad property, franchises and assets of every description, however described and wherever situated, excepting only its papers and books of account, and material and supplies, bills and accounts receivable, money and cash on hand, which papers and books of account shall be at all times open to the reasonable inspection of the

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lessee, so far as required for its protection under this lease.

To HAVE AND TO HOLD all and singular the demised premises to the lessee, its successors and assigns, for and during the term of ninety-nine years from and after the first day of April, in the year of our Lord one thousand eight hundred and eighty-eight: the lessee paying unto the lessor the rent hereby reserved, and keeping and performing the terms, conditions and agreements hereinafter contained to be by it kept and performed.

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Second: The lessor will at all times, upon reasonable request, execute and deliver any and all instruments, and take any other action, at the request and expense of the lessee, that may be requisite or necessary to confirm, carry out, effectuate and establish the terms of this lease and agreement to its full meaning and intent, and to vest in and secure to the lessee the full use and enjoyment of the railroads and property demised or intended to be demised hereby. The lessor will during the continuance of this lease and agreement maintain its existence and organization as a corporation, and to that end will comply with all the requisites and forms of law, and it will, at the request and expense of the lessee, do and perform all such acts, lawful and consistent with its rights hereunder, as shall be proper and necessary for the due protection, preservation and full enjoyment by the lessee of all the property, rights, franchises and interests hereby demised or granted to it, and to carry out the true intent and meaning of this instrument; and in default thereof it hereby authorizes the same to be done by the lessee, or by its agents, successors and assigns, in the name and as the act of the lessor; and the lessee, its successors and assigns

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394 may, at its or their own expense and charge, and for its or their own use and benefit, use the name, franchise and corporate power of the lessor in commencing, prosecuting or defending any suit or proceeding, or taking any action which may be necessary or proper to enable it or them to defend, assert, exercise or maintain any right or privilege secured to it or them by this instrument, or arising from the title or possession thereunder, or to enforce payment of damages for injuries thereto, and to give due receipts, acquittances and discharges on account
395 thereof and in relation thereto.

Third: The lessee shall not assign this lease, nor underlet the whole or any part of the demised premises, except such portions thereof as may not be required by it for railroad uses, without the consent of the directors of the lessor. But if the lessee shall unite with, or sell, or lease its railroad to any other railroad corporation, it may assign this lease to the corporation formed by such union, or to the corporation to which it thus sells or leases, such corporation becoming, and the lessee remaining, liable upon the covenants thereof.

396 Fourth: The lessee shall observe and perform all the provisions of contracts of the lessor with the owners of railroads now leased or operated by it, and shall pay the rent and perform the covenants, in the lease of the Attleboro Branch Railroad to the lessor, dated the thirty-first day of December, A. D. 1870; and at the termination of said lease, the same shall, if requested by the lessee, and if it can be done, be renewed by the lessor, from time to time, upon the most favorable terms practicable, for a term or terms not exceeding the then unexpired term of this lease; and being so renewed, shall be subject to all

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the provisions of this lease and agreement, as effectually as if now existing and herein included, and upon the expiration, or earlier termination of this lease, shall be reassigned to, and inure to the benefit of, the lessor.

Fifth: The lessee shall pay to the lessor, as rent for the demised premises, the sum of one hundred thousand dollars for each quarter in each year during the term of this lease, to wit: On the first day of July, the first day of October, the first day of January, and the first day of April, in each and every year (the first payment to be made on the first day of July, A. D. 1888), and at the same rate for any portion of a quarter, at the office of the treasurer of the lessee, in the city of Boston; and shall also pay to the lessor, during the first three (3) years of said term, the sum of ten thousand dollars ($10,000) per annum, in equal quarterly payments, on the same days as said rent is payable; and each and every year thereafter, during said term, the sum of three thousand dollars ($3,000), in like manner, as and for the expense of preserving the organization of the lessor, as herein agreed to be preserved and kept up. And the lessee will, on the first day of May, 1888, pay to the lessor the sum of thirteen hundred thousand dollars ($1,300,000), and also a sum equal to five dollars ($5) per share upon its capital stock, as and for a dividend, out of the net earnings of the lessor up to the date of this lease. The lessee shall also pay, as the same becomes due, the interest on the indebtedness of the lessor (a schedule whereof is hereto annexed), and upon such future indebtedness as shall be created for the purpose of paying such indebtedness and other existing obligations and liabilities of the lessor, in the manner herein provided, and to that end shall pay to the lessor such sums of money at such times as shall

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400 enable it punctually to meet such interest as the same comes due. And the lessee shall also pay all taxes a assessments, whether in the nature of taxes, now in be or not, of every description, national, state and municip or otherwise, upon the property, business, franchises a capital stock of the lessor as the same shall be imposed assessed, and shall at all times keep the lessor indemnif against the same during the term of this lease.

Sixth: The lessee shall at its own expense maint
401 and keep the railroad and property herein demised, a the railroad and property of the Boston & Provide Railroad Corporation in Rhode Island, hereinafter cal the "Rhode Island Company," in as good order and c dition as the same now are, and use and operate them accordance with the charter of the lessor, and the laws the Commonwealth of Massachusetts, and of the St of Rhode Island, and of the United States, so far as same are respectively applicable, shall make all retu required of it by law, and furnish the lessor with su statements and accounts as shall enable it to make returns by law required of it, and shall furnish all ca engines, rolling stock and equipment required, in
402 dition to the like property hereby demised for the and proper use and operation thereof, in such man as at all times to meet the demands of the public servi and to furnish equal facilities for travel and busin with those now afforded by the lessor, and it shall ap the proceeds of rolling stock and other personal prope herein demised, which it may deem advisable to sell, a which (with the exception of stocks of other corporatio it is hereby authorized to sell at its discretion, so as substitute therefor other like property for use in

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maintenance and operation of said railroad and property of equal value.

Seventh. The lessee shall furnish the officers of the lessor with proper accommodations at the station of the demised railroad in Boston, and with free transportation for themselves and an inspector over the railroad hereby demised (it being understood that such officers shall not exceed a president, treasurer, clerk, and six directors); and shall permit some suitable person, appointed by the directors of the lessor as an inspector of the demised property, to examine the same once in each year, so far as may be necessary to ascertain the condition thereof, and shall pay the reasonable expense of such annual inspection, in addition to the rent herein reserved.

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Eighth. The lessee will, during the continuance of this lease, protect and save harmless the lessor and the Rhode Island Company against all actions or claims for injury to persons or property during the term thereof, by reason of any want of repair of the demised road and property or appurtenances, or of the road, property and appurtenances of the Rhode Island Company, or any want of care and skill in the operation and management of the same, or by reason of any defects therein; and will not permit the lessor or the Rhode Island Company to be subjected to any payment, penalty or forfeiture, for violation of law in any respect in relation to the maintenance and operation of their said roads and property; but will indemnify and save them harmless against all loss, cost, damage or liability caused by it, or arising out of the use and operation of said roads and property, whether by reason of any contract, statute, negligence, or misfeasance, or by reason of the neglect of the lessee or lessor to use

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406 and operate said railroad and property as required by la during the continuance of this lease. The lessee will ma all permanent improvements on said railroads and pro erty at its own expense; will keep the demised premis reasonably insured, and apply the proceeds of any insu ance to restoring and replacing the property destroye or otherwise to the benefit of the demised property; a at the expiration or earlier termination of this lease, will return said demised road, and property to the less as a railroad between Boston and Providence, with its n

407 existing branches and suitably equipped and provided wi depots, stations, shops, and other structures, of at lea equal value with those now existing thereon, and in good order and condition as the same now are, togeth with all permanent improvements thereon; and with ro ing stock, machinery, tools, furniture, appliances, telegra apparatus, and equipment, of equal value with that here demised according to the appraisal thereof.

Ninth. The lessor will, upon the written request the lessee, from time to time, convey to such person persons as the lessee may appoint in such request, su portions and parcels of the real estate owned by the less

408 outside of its location, and not required by the lessee f railroad purposes, as the lessee may designate, and up such reasonable terms and for such reasonable price it may direct, at its expense, the proceeds to be receiv by the lessee, but upon an express agreement, however, the lessee, that all proceeds thereof, or a sum equal the to, shall be, or shall previously have been, from the fun of the lessee, applied to additions other than impro ments upon railroads of the lessor or their branch or connected with their real estate, which shall thereup become the property of the lessor, and subject to the p

visions of this instrument; and if at the expiration or earlier termination of this lease the lessee shall not have expended in such additions a sum equal to the proceeds of the real estate so conveyed, the balance unexpended shall be paid over to the lessor without interest. But the lessor shall not be obliged, unless its directors consent, to convey any of its real estate in Boston east of the present Dartmouth Street bridge, or of the tract of land owned by it near the junction of its main road with the Dedham branch thereof, and between said branch and the New York and New England Railroad, containing about thirty-three (33) acres, upon which tract, unless thus previously conveyed, and unless it shall return the shops of the lessor now existing, the lessee shall, if not otherwise agreed with the directors of the lessor, place the shops which it is to return to the lessor upon the expiration or earlier termination of this lease, under the Eighth Article hereof.

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Tenth. The capital stock of the Boston & Providence Railroad Corporation in Rhode Island (herein called the Rhode Island Company) owned by the lessor, embraced within the terms of this lease, and assigned to the lessee at the time of the delivery hereof, shall be held and used by the lessee during the term of this lease, for the purpose of maintaining the road and property of said Rhode Island Company, as a practical extension and portion of the road and property of the lessor, and at the termination of this lease shall be reassigned to the lessor in such manner as to return to it the entire ownership of the present road and property of said Rhode Island Company, and all improvements thereon. But if the Rhode Island Company or the lessee shall, for the purpose of improving terminal facilities at Providence, or other necessary railroad purposes in Rhode Island, exchange land for other

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land therein of equal value, or sell land and purch
other land of equal value for the same purpose, the l
thus obtained by exchange or purchase shall be recei
by the lessor at the expiration or earlier termination
this lease, in place of such land so exchanged or sold.

Eleventh. The lessor hereby assigns, transfers and
livers to the lessee all its material and supplies, bills
accounts receivable, money and cash on hand to be by
lessee applied (at the value thereof to be fixed by
413 praisal), to the payment of the dividend herein agr
to be paid upon the capital stock of the lessor on the f
day of May, 1888, and to the payment of outstanding
bilities of the lessor. The lessor shall issue bonds
periods not exceeding the longest allowed by law, and
a rate of interest as low as practicable, for such sums
may be necessary to fund all its outstanding liabili
which are not thus paid, including the expense of
fending and adjusting all claims and suits against
lessor, arising in the past use and operation of the
mised premises, or of any railroad operated by the les
which bonds shall, at the request of the lessee, be
tended as they mature for periods not exceeding the
414 expired term of this lease on the most favorable terms t
practicable.

To provide for the payment of the net indebtedness
the lessor as thus ascertained and funded, the lessee sh
within six months after the same is thus approximat
ascertained, and not later than January 1st, 1890, est
lish a sinking fund in the hands of three trustees,
pointed and maintained by its directors from their o
number, and shall make such annual or more frequ
payments thereto as may be necessary, with interest
four per cent. per annum, compounded semi-annually,

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cause it to meet said indebtedness during the term of this lease. And the lessee hereby agrees that such sinking fund shall be adequate to pay, and shall pay, said indebtedness at its maturity, as thus funded and extended, and that it will make up any deficiency therein. All bonds thus issued shall be certified by the lessor and lessee as issued under the provisions of this lease.

Twelfth. The lessee shall not sell or otherwise dispose of any of the stocks herein demised and transferred to it, except by assignment of this lease in case of its union 416
with, or sale, or lease of its railroad to some other railroad corporation, as provided in Article Third hereof, in which case it may assign them to the corporation formed by such union, or to which it thus sells or leases, to be held by such corporation in the same manner and under the same restrictions as the same are herein provided to be held by the lessee. But the lessee, with the consent of the Board of Directors of the lessor, may, at any time, sell and transfer all or any portion of the stocks of other corporations embraced within the terms of this instrument and hereby demised, except the stock of the Rhode Island Company, and in case of such sale, unless the lessee shall have otherwise disposed of the proceeds thereof, by the 417
consent of the directors of the lessor, it shall pay over to the lessor, at the expiration or earlier termination of this lease, the price received, without interest, in full of all obligation upon its part to return such stocks to the lessor under the provisions of this instrument. Provided, however, that the stocks of the Union Freight Railroad and of the Providence, Warren and Bristol Railroad, if not thus sold, shall be returned to the lessor, in such manner as to give it the same proportionate interest in and control over the present roads and property of such corpora-

418 tions with all permanent improvements thereon, as the lessor now has thereby.

Thirteenth. If this lease shall be terminated within the demised term of ninety-nine years without fault of the lessee, the lessor shall pay the lessee a proportional part (having regard to the unexpired portion of the lease and other circumstances) of its indebtedness which may have been funded by the lessor and paid by the lessee under the provisions of this instrument, [but not including
419 interest which may have been paid thereon], and of the cost of such permanent improvements as may have been made and paid for by the lessee upon the demised premises and if the parties are unable to agree with reference thereto, the same shall be submitted to the decision of three arbitrators, one chosen by each party, and the other by the two thus chosen, whose decision shall be final; and if at any time it shall happen that this lease shall be or become invalid, or shall be terminated without the fault of either party, then, and in such case, each party shall be restored, as nearly as may be, to the condition in which it stood before the lease, it being understood that the rent and interest paid by the lessee on the funded debt of the
420 lessor shall be considered equivalent to the value of the occupation, but that the lessor is not to repay any part of the money agreed to be paid to it by the lessee on the first day of May, 1888, under the provisions of Article Five hereof.

Fourteenth. This lease and agreement are upon the condition that if the lessee shall neglect and refuse to pay the rental herein, reserved, or any part thereof, or to pay the interest upon the indebtedness of the lessor, as herein agreed to be paid, for more than thirty days after the

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same shall become due and payable; or if the lessee shall continue to neglect or fail to perform any or either of the other covenants, on its part to be performed, for more than six months after written notice from the lessor of such neglect or failure, and that, if continued, it will be regarded as a forfeiture of this lease, then, and in either of such cases, the lessor may lawfully, at any time after the lapse of said thirty days or six months, as the case may be, and while such neglect or default continues, without further notice or demand, enter into or upon the leased premises, or any part thereof, in the name of the whole, 422
and repossess the same as of its former estate, and expel the lessee, and those claiming under it, without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenants; but nothing herein shall be considered to work a forfeiture of this lease when the omission or delay in performing the obligations hereunder—saving only the payment of rent and of interest—results from causes reasonably beyond the control of the lessee, or when from any cause such omission or delay ought not in equity to work a forfeiture; and in case of disagreement as to the duty of the lessee in performing any of its covenants,—except those for the payment of rent and of interest,—the failure to perform the same shall not 423
entitle the lessor to enter for breach of covenant until the lapse of sixty days after the final determination of the question by suit or arbitration.

Fifteenth. That the property herein demised and to be accounted for at the expiration or earlier termination of this lease may be accurately determined, there shall be made, as of the day when this lease takes effect, a full, complete and particular inventory, and description of all

424 estate and property, real and personal, belonging to the lessor, and coming into the possession of the lessee by virtue of this lease, and that the value of the engines, cars, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus and equipment hereby demised, and to be returned may be fixed, an appraisal thereof shall be made. Such inventory, description and appraisal shall be made by two competent persons, one selected by each party. In case of their disagreement, they shall refer the matter in difference to some third person, whose decision shall 425 be final. Such inventory, description and appraisal shall be made in duplicate, and an original furnished to each party, and shall be evidence of the nature, value and condition of the property at the time it is made in all cases in which any question of such nature, condition or value may arise.

Sixteenth. In case of any question or controversy arising between the parties hereto as to the meaning and intent of this instrument, or any part thereof, or as to anything done thereunder, or growing out thereof, the same shall be referred to the arbitration of two referees, one selected by each party, who shall have power, in case of 426 their disagreement, to choose a third, and the award of the referees so selected, or of a majority of them, shall be final and binding upon the parties.

In Witness Whereof, the Boston and Providence Railroad Corporation, by its President, Henry A. Whitney and its Treasurer, Benjamin B. Torrey, and the Old Colony Railroad Company, by its President, Charles F. Choate, and its Treasurer, John M. Washburn, have to this and one other instrument of even date and tenor herewith, signed

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their corporate names and affixed their corporate seals, the day and year first above written.

THE BOSTON AND PROVIDENCE RAILROAD CORPORATION.

By HENRY A. WHITNEY, President.
BENJAMIN B. TORREY, Treasurer.

OLD COLONY RAILROAD COMPANY.

By CHARLES F. CHOATE, President.
JOHN M. WASHBURN, Treasurer.

428

(Seal of Old Colony Railroad Company)

(Seal of Boston and Providence Railroad Corporation)

(Duly acknowledged on April 11, 1888.)

429

430 **(z) Report of Administration of the Properties o Old Colony Railroad Company, of Boston an Providence Railroad Corporation, and of Prov dence, Warren and Bristol Railroad Compan for 1938.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

No. 16562

431

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILRO COMPANY,

Debt

Now come Howard S. Palmer, James Lee Loomis a Henry B. Sawyer, as the Trustees of the property of t Principal Debtor (hereinafter called "the New Hav
432 Trustees"), and respectfully represent:

1. On April 19, 1938 the New Haven Trustees fi herein their report of administration which stated accounts of their administration of the properties of Colony Railroad Company (hereinafter called "the Colony") and of Providence, Warren and Bristol R road Company from October 23, 1935 up to and includ December 31, 1937; and on July 18, 1938, this Co entered its Order No. 300 herein which approved s

accounts in the amount of $11,789,037.22 and further provided:

"2. That $11,237,101.22 of said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Old Colony Railroad Company as an expense of administration prior to any mortgage or other lien thereon and to any other indebtedness of said Company, and may be recovered by the Trustees of the property of the Principal Debtor herein out of the earnings or property 434
of said Old Colony Railroad Company by such method as the Court shall hereafter determine.

"3. That the incidence of the $551,936.22 for administration of the property of Providence, Warren and Bristol Railroad Company be and it hereby is reserved for later determination.

"4. That the question of interest upon said amounts be and it hereby is reserved for later determination."

The New Haven Trustees beg leave to refer to said report of administration and to said Order No. 300 with the same force and effect as if they were set forth fully herein. 435

2. By Order No. 217, entered herein on July 19, 1938, the Court ordered the Old Colony Trustees forthwith to reject the lease dated April 7, 1888 from Boston and Providence Railroad Corporation (hereinafter called "the Boston and Providence") to the Old Colony, and said lease was so rejected on the same day.

436

3. Paragraph 5 of said Order No. 217 provided as follows:

> "Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of
437 Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate."

4. In paragraph 8 of Petition for Order No. 301, filed herein on July 29, 1938, it was alleged that said amount of $11,237,101.22 included $3,955,298.93 covering payments made under the aforesaid lease from the Boston and Providence and expenditures incurred in administration of property of the Boston and Providence during the period June 4, 1936 to December 31, 1937 (both dates inclusive) and on April 20, 1939 this Court entered its Order No.
438 301 herein which provided:

> "(1) That the accounts as stated in said petition be and they hereby are approved in the amount of $3,955,298.93, for the period June 4, 1936 to December 31, 1937 (both dates inclusive); subject, however, to adjustment to be reflected in the accounts for succeeding periods with respect to items stated in the approved account on an accrual basis and subsequently liquidated.

439

"(2) That said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Boston and Providence Railroad Corporation, prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Corporation, in favor of the Trustees of the property of the Principal Debtor herein; provided, however, that if and to the extent that said lien and charge shall be satisfied from the estate of Boston and Providence Railroad Corporation, the lien and charge imposed upon the estate 440
of the Old Colony Railroad Company under Order No. 300 herein, shall be correspondingly reduced.

"(3) That the question of interest upon the amount of the charge imposed by paragraph (2) hereof be and it hereby is reserved for later determination."

5. The New Haven Trustees have continued to operate the properties of the aforesaid subsidiary debtors and of the Boston and Providence for their account, as directed by orders of this Court, and have made certain capital expenditures upon said properties and certain tax 441
payments as authorized by this Court.

6. The New Haven Trustees have prepared accounts of their administration of the properties of said subsidiary debtors and of the Boston and Providence for the year 1938, which said accounts are hereto annexed, made a part hereof, and marked Exhibit 1, said Exhibit consisting of a Summary of Accounts covering Administration of the Property of Old Colony Railroad Company, Boston and Providence Railroad Corporation and Providence, Warren and Bristol Railroad Company, for the Year 1938

442 (with statements marked A and B attached). Said Exhibit has been prepared from records and accounts prepared and kept by the New Haven Trustees pursuant to orders herein.

7. The charges stated in said accounts for expenditures for additions and betterments and the net credits for property retired and not replaced are drawn from the current accounts of the New Haven Trustees. The revenues and expenses of operation of the properties have
443 been credited or charged, as the case may be, on the basis of the segregation formula duly approved herein, subject to the following adjustments:

(a) By reason of Order No. 221 herein, the Old Colony has been debited $21,073.01 and the Boston and Providence has been credited $22,135.10 in the segregation results for the year 1938.

(b) By reason of an adjustment in taxes of the Boston Terminal Company, the Old Colony has been credited with $27,048.02 in Joint Facility Rents for the administration period prior to June 1, 1936, and the Boston and Providence has been charged
444 $177.32, the 1938 segregation having allowed the Old Colony adjustment only back to June 1, 1936 and having allowed the Boston and Providence adjustment back to that date instead of to June 3, 1936.

(c) $7,500.00 has been credited to the Old Colony and $7,500.00 has been credited to the Boston and Providence for the dividend of $15,000.00 from the Union Freight Railroad Company covering the year 1937.

445

(d) The Old Colony has been debited $42,322.23 and the Boston and Providence has been credited $36,417.64, to correct the past allocation of storage and demurrage revenues and certain operating expenses at Pawtucket, Rhode Island, and to correct past allocations in the account for crossing protection at Mansfield, Massachusetts, and in the accounts for train fuel and for handling company coal.

8. There is also annexed hereto, made a part hereof, and marked Exhibit 2, a statement of taxes accrued prior to October 24, 1935, but paid thereafter by the Trustees of the property of The New York, New Haven and Hartford Railroad Company on the property and income of Old Colony Railroad Company, Boston and Providence Railroad Corporation and Providence, Warren & Bristol Railroad Company. 446

WHEREFORE, the New Haven Trustees pray that the Court approve the accounts herein reported in the aggregate amount of $5,750,920.01, subject to adjustment to be reflected in the accounts for subsequent periods with respect to items stated on an accrual basis and subsequently liquidated, and order as follows: 447

(a) That $5,562,505.51 of said amount with such interest thereon as is later determined to be payable constitute a lien and charge on the earnings and property of Old Colony Railroad Company as an expense of administration prior to any mortgage or other lien thereon and to any other indebtedness of said Company and on a parity with like charges held to have such priority under Order No. 300 and like orders entered or to be entered herein;

(b) That $2,182,728.63 of said amount with such inter-

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est thereon as is later determined to be payable, covering administration of the property of the Boston and Providence Railroad Corporation in the possession of this Court during the year 1938, constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Corporation and on a parity with like charges held to have such priority under Order No. 301 and like orders entered or to be entered in favor of the Trustees of the

449 property of the Principal Debtor as an expense of administration of said property of said Corporation by said Trustees, and that, if and to the extent that said lien and charge shall be satisfied from the estate of Boston and Providence Railroad Corporation, the lien and charge imposed upon the estate of Old Colony Railroad Company hereunder shall be correspondingly reduced;

(c) That $188,414.50 of said amount with such interest thereon as is later determined to be payable constitute a lien or charge on the earnings and property of Providence Warren and Bristol Railroad Company prior to any mortgage or to any other indebtedness of said Company and

450 on a parity with like charges held to have such priority under Order No. 341 and like orders entered or to be entered herein.

Dated: August 1, 1939.

H. S. PALMER
JAMES LEE LOOMIS
HENRY B. SAWYER
Trustees

W. W. MEYER
Counsel for Trustees.

(Verification omitted in printing.)

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EXHIBIT 1, ANNEXED TO REPORT OF ADMINISTRATION OF THE PROPERTIES OF OLD COLONY RAILROAD CO., ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

SUMMARY OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF OLD COLONY RAILROAD COMPANY, BOSTON AND PROVIDENCE RAILROAD CORPORATION AND PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY, FOR THE YEAR 1938

	Old Colony Railroad Year 1938	Boston and Providence Railroad Jan. 1st. to July 19, 1938	Boston and Providence Railroad July 20th. to Dec. 31, 1938	Year 1938	Prov., Warren and Bristol Railroad Year 1938	Grand Total
Capital Expenditures (Net) (Statement A)	#$ 40,753.09	$ 5,559.23	$ 4,894.94	$ 10,454.17	$ 2,113.17	#$ 28,185.75
Operating Deficits (Statement B)	2,301,868.35	704,400.33	430,993.80	1,435,394.13	147,621.78	3,584,884.26
Charges for handling Company Coal and Interest on Investment in Equipment and Other Facilities not included in above Operating Deficits (Statement B)	165,424.27	569,154.20	467,726.13	1,036,880.33	25,457.47	1,227,762.07
Grand Total	$2,426,539.53	$1,279,113.76	$903,614.87	$2,182,728.63	$175,192.42	$4,784,460.58

Credit.

New Haven, Conn.,
May 4, 1939.

(Statements A and B omitted in printing.)

EXHIBIT 2, ANNEXED TO REPORT OF ADMINISTRATION OF THE PROPERTIES OF OLD COLONY RAILROAD CO., ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

STATEMENT OF TAXES ACCRUED PRIOR TO OCTOBER 24, 1935 BUT PAID THEREAFTER BY TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ON THE PROPERTY AND INCOME OF OLD COLONY RAILROAD COMPANY, BOSTON AND PROVIDENCE RAILROAD CORPORATION AND PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY

OLD COLONY RAILROAD COMPANY

Detail		Voucher No.	Period Covered	Date Paid	Massachusetts Gross Amount	Rhode Island Gross Amount
Abington,	Mass.	40762	Calendar Year 1935	12/30/35	$ 1,076.93	
Attleboro,	"	40765	"	12/28/35	493.30	
Barnstable,	"	40768	"	12/23/35	2,317.27	
Braintree,	"	40775	"	12/30/35	19,418.40	
Brockton,	"	40766	"	1/ 3/36	38,480.02	
Bourne,	"	40778	"	12/26/35	1,437.96	
Canton,	"	40779	"	12/24/35	80.73	
Clinton,	"	40782	"	1/ 2/36	1,670.06	
Dedham,	"	40786	"	12/28/35	13,637.40	
Fall River,	"	10797	"	12/24/35	49,356.00	
Fitchburg,	"	10799	"	12/30/35	13,395.52	
Framingham,	"	40801	"	12/24/35	7,585.65	
Hanover,	"	40806	"	12/31/35	1,241.35	
Holbrook,	"	40810	"	12/30/35	1,499.46	
Leominster,	"	40815	"	12/24/35	2,878.95	
Lowell,	"	40816	"	12/24/35	9,620.17	
Mansfield,	"	40817	"	12/26/35	1,333.60	
Marlboro,	"	40819	"	12/30/35	3,449.90	
Middleboro,	"	40824	"	12/26/35	2,034.53	
New Bedford,	"	40830	"	12/28/35	38,868.76	
North Attleboro,	"	40833	"	12/30/35	1,094.52	
Plymouth,	"	40840	"	12/24/35	3,052.80	
Provincetown,	"	40841	"	12/27/35	1,464.00	
Randolph,	"	40842	"	12/28/35	1,086.75	
Scituate,	"	40847	"	12/31/35	1,966.94	
Sharon,	"	40850	"	12/28/35	48.90	
Stoughton,	"	40856	"	12/24/35	697.50	
Taunton,	"	40859	"	12/23/35	12,490.85	
Walpole,	"	40862	"	12/26/35	1,065.84	
Wrentham,	"	40872	"	1/11/36	1,355.62	
Norwood,	"	40878	"	12/24/35	1,140.02	
Quincy,	"	40879	"	12/28/35	31,179.30	
Boston,	"	45066	"	2/14/36	229,189.10	
Warren,	R. I.	45252	"	1/15/36	.....	$ 2,004.00
Tiverton,	"	45301	"	1/15/36	.....	2,750.00
Providence,	"	16448	"	1/29/36	.....	16,899.12

Exhibit 2, Annexed to Report of Administration of the Properties of Old Colony Railroad Co., Etc.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

STATEMENT OF TAXES ACCRUED PRIOR TO OCTOBER 24, 1935 BUT PAID THEREAFTER BY TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ON THE PROPERTY AND INCOME OF OLD COLONY RAILROAD COMPANY, BOSTON AND PROVIDENCE RAILROAD CORPORATION AND PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY

BOSTON AND PROVIDENCE RAILROAD CORPORATION

Detail		Voucher No.	Period Covered	Date Paid	Massachusetts Gross Amount	Rhode Island Gross Amount	
Attleboro,	Mass.	40765	Calendar Year 1935	12/28/35	$ 10,105.69		
Canton,	"	40779	"	12/21/35	1,224.20		
Dedham,	"	40786	"	12/28/35	3,911.70		
Mansfield,	"	40817	"	12/26/35	796.00		
Sharon,	"	40850	"	12/28/35	639.29		
Stoughton,	"	40856	"	12/21/35	666.50		
Boston,	"	45066	"	2/11/36	95,816.20		
Central Falls,	R. I.	46447	"	1/17/36	.....	$ 6,023.25	
Providence,	"	46448	"	1/29/36	.....	42,297.54	
"	"	46263	"	11/9/35	.....	5,352.52	
East Providence	"	6174	"	1/15/36	.....	6,089.87	
Total Payments					113,159.58	59,763.18	$172,922.76
Less Recollectible					2,387.37	3,423.93	5,811.30
Net Payments					110,772.21	56,339.25	167,111.46
Proportion accrued prior to October 24, 1935 and not included in previous report of Administration					$ 89,836.26	$ 45,691.13	$135,527.39

PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY SUMMARY

Warren,	R. I.	45252	Calendar Year 1935	1/15/36	.....	$ 6,475.20
Providence,	"	46448	"	1/29/36	.....	835.94
Barrington,	"	6172	"	1/17/36	.....	3,246.00
East Providence,	"	6174	"	1/15/36	.....	5,781.13
Total Payments					.....	16,332.27
Less Recollectible					.....	28.84
Net Payments					.....	16,303.43
Proportion accrued prior to October 24, 1935 and not included in previous report of Administration						$13,222.08 $13,222.08

SUMMARY

Old Colony Railroad Company (Real Estate Tax)	$394,891.65
" " " " (Income Tax and Interest)	422,818.31
Total Old Colony	817,709.96
Boston and Providence Railroad Corporation	135,527.39
Providence Warren and Bristol Railroad Company	13,222.08
Total Old Colony System	$966,459.43

New Haven, Connecticut,
May 4, 1939.

Norwood,	"	40618	"				
Quincy,	"	40879	"				
Boston,	"	45066	"	12 28 35	31,179.30		
Warren,	R. I.	45252	"	2/14/36	229,189.10		
Tiverton,	"	45301	"	1 15 36	.....	$ 2,094.00	
Providence,	"	46448	"	1/15/36	.....	2,750.00	
"	"	46263	"	1 29 36	.....	16,899.12	
North Tiverton,	"	50101	"	11/ 9/35	.....	397.88	
" "	"	141	"	11 27/35	.....	441.97	
Middletown,	"	782	"	11 27/35	.....	103.03	
"	"	50663	"	12/18/35	.....	69.15	
				12 18 35	.....	296.65	
Total Payments					495,702.10	22,961.80	$518,663.90
Less recollectible					24,908.29	6,836.18	31,744.47
Net Payments					470,793.84	16,125.62	486,919.43
Proportion accrued prior to Oct. 24, 1935 and not included in previous report of Administration					381,813.77	13,077.88	394,891.65

					Amount	
Income Tax	55003	Calendar Year	1934	12/16/35	44,331.92	
"	20036	"	1935	3/10/36	61,628.91	
"	35024	"	1935	6 9/36	61,628.90	
"	50060	"	1935	9/11/36	61,628.91	
	60857	"	1935	12 10 36	61,628.90	
Income Tax and Interest	62275	Calendar Year	1922			
		1925 incl. & Yr.	1930	2/27/36	131,970.77	
Proportion accrued prior to October 24, 1935 and not included in previous report of Administration						422,818.31
Grand Total due from Old Colony						$817,709.96

460 **(aa) Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896.**

Chapter 516 of the Acts and Resolves of the General Court of Massachusetts for the year 1896 reads in part and in addition to those parts quoted in the Petition for Order No. 398 hereinbefore set forth, as follows:

"Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this
461 act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

(bb) Chapter 784 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1913.

462

Chapter 784 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1913 reads in part as follows:

"Section 1. The board of railroad commissioners * * * shall hereafter be called the public service commission * * *"

(cc) Chapter 350 of the General Acts passed by the General Court of Massachusetts in the year 1919.

463

Chapter 350 of the General Acts passed by the General Court of Massachusetts in the year 1919 reads in part as follows:

> "Section 117. The public service commission, existing under authority of chapter seven hundred and eighty-four of the acts of nineteen hundred and thirteen, and chapter two hundred and eighty-three of the General Acts of nineteen hundred and eighteen, and the board of gas and electric light commissioners, existing under authority of chapter seven hundred and forty-two of the acts of nineteen hundred and fourteen, are hereby abolished. All the rights, powers, duties and obligations of said commission and said board are hereby transferred to and shall hereafter be exercised and performed by the department of public utilities established by this act, which shall be the lawful successor of said commission and said board."

464

(dd) Order of the Department of Public Utilities of the Commonwealth of Massachusetts.

465

On July 17, 1931 the Department of Public Utilities of the Commonwealth of Massachusetts entered the following order regarding the proportion of use of The Boston Terminal Company properties, which order has not been amended or withdrawn:

> "After public hearing, the Department determines that the proportion of use of the South Union Station and facilities be fixed at 70% of use by the New York, New Haven and Hartford Railroad Co. and 30% of use by the New York Central Railroad Co., lessee of the Boston & Albany Railroad Co. Alan Brooks, Executive Secretary."

466 **(ee) Brief of New Haven Trustees filed in the Supreme Judicial Court of Massachusetts in proceedings concerning the petition of Boston & Providence Railroad Corporation for re-determination of the proportions of use of The Boston Terminal Company properties.**

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Equity No. 63858
Equity No. 63859

467 Suffolk, ss.:

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO., Debtor, in Reorganization Proceedings,

vs.

FRANCIS M. McKEOWN, ABRAHAM C. WEBBER, RICHARD D. GRANT, JOHN J. CURLEY, and JOHN M. WHOULEY, constituting the DEPARTMENT OF PUBLIC UTILITIES of the COMMONWEALTH OF MASSACHUSETTS.

468 ---

These two bills have been brought for the purpose of having this Court prevent the respondents from entering upon certain proceedings which the respondents have determined to hold.

Attached to each bill herein is copy of a petition filed with the respondents by Trustees of the Boston & Providence Railroad Corporation. It is the subject matter of said petition to the Department of Public Utilities which we say should not be entered upon. At a preliminary hearing upon said petition, we filed a motion to dismiss

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said petition of the Boston & Providence Trustees. A copy of said motion to dismiss is likewise attached to each of these bills in equity, and contains generally the reasons why we believe the Department of Public Utilities lacks power under the law to proceed in the matter. The motion to dismiss was overruled, and the Department of Public Utilities has given notice that it will proceed to hold hearings upon said petition of the Boston & Providence Trustees.

I.

470

THE JURISDICTION OF THIS COURT.

* * * *

II.

THE BOSTON & PROVIDENCE PETITION.

The petition of the Boston & Providence Trustees to the Department of Public Utilities purports to be filed under section 10 of the Boston Terminal Company Charter (Acts of 1896, Chapter 516). The material part of said section 10 is set out in the petition of the Boston & Providence Trustees, in paragraph 4 thereof (see copy of said petition 471 attached to these bills in equity). The second sentence begins:

> "Each of said railroad companies shall pay for such use of said station and facilities in *the proportion in which it has the use thereof* * * *."

The last sentence in said section 10 gives this Court jurisdiction in equity to compel such payments to be made.

The evident purpose of the Terminal Act was to create a union station, and require the five railroads on the

472 south side of the city to use it. The Boston & Providence was then entering Park Square, the Albany at Kneeland Street, the New England via Fort Point Channel, to Summer Street. The act required those railroads to use the terminal, in the sense that their own stations must be given up; and this was necessary, even though in 1896 the Old Colony, the Boston & Providence and the New England were controlled or operated by the New Haven Railroad. In the absence of such requirement, conceivably the act might not apply to a lessor railroad if its lease were terminated.

473 However, section 10, in respect to *paying for use*, clearly is a provision primarily for the benefit of the Terminal Company itself, imposing the obligation to pay, and making it enforcible. Section ten requires payment on the *basis of use*. It is only a *user*, while acting as such, with which any proceedings before the Railroad Commissioners (now Department of Public Utilities) are concerned. In 1931 there were long-drawn-out hearings before the Department of Public Utilities involving the percentages to be paid by the Boston and Albany and the New Haven. As such, the New England (then merged with the New Haven), the Old Colony (leased to the New Haven), and the Boston & Providence (leased to the Old Colony), were
474 in no wise concerned with that proceeding. The 1931 order of the Department of Public Utilities did not concern itself with apportioning expenses between the New Haven, the Old Colony and the Boston & Providence.

The Assistant Attorney General, and Counsel for the Boston & Providence, who addressed this Court, seemed to view the efforts of your petitioners to prevent action now by the Department of Public Utilities as an attempt to disregard or to escape the obligations of a state statute enacted under the police power, on some theory that the act does not apply to them. That is not so. The Terminal

475

Company is not in bankruptcy. It is and always has been insolvent in the sense that its expenses far exceed its revenues. We do not question the application of the act as between users, even if one should be in bankruptcy. For example, if which is not the fact, the New York Central (lessee of the Boston and Albany) and we, Trustees of the New Haven, were in disagreement as to the division of the Terminal Company expenses between us, we have no doubt that either the New York Central, or we, would have the right to petition the Department of Public Utilities to settle the question. The fact that the New Haven is in bankruptcy would not be material, so 476
long as the obligation fixed by the charter remained unchanged. Whether the obligation to use the Terminal, and the obligation to pay for such use, or either of them, can be broken or disregarded may well admit of serious doubt, so long as the charter remains unchanged. No such contention is made by us. We make no attack on the statute, nor upon the power of the Department of Public Utilities under the statute, in an applicable case. No contention is made that there is a conflict between the bankruptcy proceedings and the statute. There is none, for we as users are paying our present fixed proportion of the Terminal Company expenses.

Nor is there any pertinency in the contention made be- 477
fore this Court that the decision in the Second Circuit Court of Appeals is controlling here. It is not even in point. In that case, a Massachusetts statute forbade a railroad to close a passenger station without first getting written consent of the Department of Public Utilities. The bankruptcy court held that in a great emergency (he found that the Old Colony Railroad was losing over $10,000 *per day* in its passenger operation), the court could order its Trustees to reduce losses by reducing service. The Circuit Court of Appeals held (two to one)

478 that in the absence of *express* language the court lacke
that power, and that it could not be implied. That de
cision will be reviewed by the United States Supreme
Court, who have granted certiorari.

The issue here is in fact different. We, your petitioners
are paying the 70% of the Terminal expenses, which in
1931 it was decided should be the proportion of the New
Haven system. The Boston & Providence are paying the
Terminal Company nothing. Were the Boston & Provi
dence Trustees operating their properties, were they
479 separate user, the statute clearly would apply. But the
Boston & Providence are not using their property, no
using the Terminal, nor making any payments therefor
Meanwhile, this railroad is being operated by us, your
petitioners, by order of the Federal Court in Connecticut
and with the approval of the Massachusetts Federal Court
When the Massachusetts Federal Court on August 5, 1938
approved the petition of a creditor for the reorganization
of the Boston & Providence Railroad Corporation, it
ordered:

> "That until further order, all persons, * *
> are restrained and enjoined * * * from inter
> fering in any manner with the *present operation*
480 of its railroad or properties or the carrying on o
> its business * * *."

That order is still in effect. Admittedly, the Federal
judge operating said railroad, has assumed, while so doing
to charge and credit expenses and revenues in the same
manner in which he does so with respect to other proper
ties operated by him.

It is the conviction of your petitioners that the Trus
tees of the Boston & Providence have no desire to have
only a determination of the Terminal expenses betwee

481

the Boston & Albany on one side and your petitioners on the other side. They are not really concerned with that—there is no disagreement between the Boston and Albany and your petitioners. What the Boston & Providence Trustees desire is a breakdown of that 70% which we, as such operating Trustees, are paying. In the Connecticut Federal Court they have attacked the action of that Court so far as it relates to charges against the Boston & Providence. Being unable to secure what they want in that court's administration accounting, although the same has been appealed to the Circuit Court of Appeals, they now want the Department of Public Utilities to make a decision which they hope will be more favorable.

482

This conviction of your petitioners is no mere belief, no mere assertion. It is found clearly stated in the petition of Boston & Providence Trustees to the Department of Public Utilities. (Copy attached to these bills in equity.) In Paragraph No. 7, they say that your petitioners have continuously operated all these railroad properties, including those of Boston & Providence up to the present time, and in that connection have used the South Station. Again, in Paragraph No. 8, they repeat the statement. But it is in Paragraph No. 10 of their petition that the truth is disclosed, namely, that their petition is filed with the Department of Public Utilities, because they prefer to have the Department of Public Utilities, and not the Connecticut Federal Court where the matter is pending, determine the matters of accounting. Said Paragraph No. 10 of the Boston & Providence Trustees states:

483

> "10. That it now appears to be desirable and necessary to have a determination by this department under the provisions of Statutes of 1896, C. 516, of the proper proportion of expenses to be paid

484 by the various using railroads for the use of said South Station to the end that the extent of the charges therefor against B & P may be fairly and equitably determined, *for the reason that the Trustees of New Haven and Old Colony now propose to charge B & P* not only in the future but also for a period from June 4, 1936 (the day after the rejection of said Old Colony lease) up to the present time *with such share of the expenses of said South Station as may be determined by the United States District Court for the District of Connecticut;* and
485 that such proposed charges by such Trustees for the period from June 4, 1936 to December 31, 1937, inclusive, are contained in an accounting now pending in said United States District Court for the District of Connecticut, * * * and that, *in the opinion of your applicants, the proper tribunal to determine said charges is the Department of Public Utilities in Massachusetts and not said United States District Court for the District of Connecticut.*"

It is this collateral attack upon matters pending before the Connecticut Court, matters which are properly before that Court as a court of bankruptcy, matters relating solely
486 to the administration of properties being operated by that Court, matters in which said Boston & Providence Trustees are parties in that Court, which we deprecate, and in these bills seek to have prevented.

III.

The Bankruptcy Statute.

The statute, under which the Connecticut Court is proceeding, is Public No. 381, approved August 27, 1935, being

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Section 77 of the Federal Bankruptcy Act. It appears in U. S. C. A., Title 11, sec. 205. It is designed to permit the reorganization of railroads, without the necessity of expensive receiverships. Where a petition for reorganization is approved as properly filed the Court has exclusive jurisdiction of the debtor and its property wherever located, and also such powers which the Court would have had had it appointed a receiver in equity. Par. (a). Trustees shall be appointed. Par. (c)(1). Trustees shall file schedules and other information necessary to disclose the conduct of the debtor's affairs. Par. (c)(4). Where a lease is rejected, the court may order the lessee to continue operation *on or for the account of the lessor.* Par. (c)(6).

488

Paragraph (c)(10) reads:

> "The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a *segregation and allocation*, as the necessities of the case may require, of the *earnings and expenses* between and to the *divisions and parts* of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or separately subject to lease, and *may refer to the Commission* for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the *method or formula by which such segregation and allocation shall be made;* and thereafter such segregation and allocation may be made at the expense of the debtor's estate."

489

It is this matter of accounting and administration, this segregation and allocation of earnings and expenses between

490 and to divisions and parts, expressly provided for in the quoted paragraph, which the Boston & Providence Trustees seek to have passed upon by the Department of Public Utilities, although the Connecticut Federal Court itself has this matter in its charge, and repeatedly has passed upon the subject. The subject matter is the allocation, under the Bankruptcy Act, of earnings and expenses of properties within the possession of, under the control of, being operated by, the Bankruptcy Court.

* * * * * * * * *

IV.

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OUTLINE OF PROCEEDINGS HAD IN THE CONNECTICUT FEDERAL COURT, PERTINENT TO THESE PROCEEDINGS.

As the Court well knows, The New York, New Haven and Hartford Railroad Company, on October 23, 1935, filed its petition for reorganization under Section 77 of the Bankruptcy Act. Your Petitioners are the Trustees of its estate. At that time, the New Haven system consisted of many separate ownerships, including, among the many others, its lease of the Old Colony Railroad Company, which in turn was lessee of the Boston & Providence Railroad Cor-

492 poration.

In June, 1936, the Trustees appointed by the Connecticut District Court to administer the New Haven's estate rejected the Old Colony lease. From then on, many things took place which are material to the matters involved in these bills in equity. Counsel have selected and filed with the Court certified copies of certain petitions, orders, decisions, and other matters, which are taken from the printed proceedings in the New Haven reorganization. These will now be explained.

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(1) Petition for Order No. 217 was a petition filed October 7, 1937 (Record, 3263), by Bankers Trust Co., a New Haven creditor. This petition requested the court to direct its Trustees, who are your petitioners herein, to cease making cash payments out of the New Haven estate under the terms of the Boston & Providence lease. The eighth and ninth paragraphs of the petition (Record, 3268-3271) alleged that the Court's Trustees had recently completed a segregation of revenues from and expenses of the New Haven's leased and mortgaged lines, which showed that the Boston & Providence was being operated at a large loss, and the petition asserted that no further payments 494
on account of the Boston & Providence lease should be made out of the New Haven's estate to the detriment of New Haven creditors.

An order (Record, 3279, annexed to the petition) was entered forthwith, providing that if any answer to the petition should challenge the *segregation of revenues and expenses as constituting a proper basis for the determination of the earnings of the property of the Old Colony or the property of the Boston & Providence*, the parties should show cause why the Court should not refer the issues thus raised to the Interstate Commerce Commission for its recommendation as to the method or formula by which said segregation should be made, all pursuant to the Bank- 495
ruptcy Act, Section 77, (c)(10).

(2) The Boston & Providence filed on October 21, 1937, its answer to the Petition for Order No. 217 (Record, 3427). It was signed by Mr. Bentley W. Warren, now one of the Boston & Providence Trustees. In Paragraph 2 of this answer, it appears that the Boston and Providence had intervened in these proceedings. In Paragraph 8, it challenged the "Segregation of Revenues and Expenses" which had been prepared by the New Haven Trustees. It denied

496 that the segregation showed a loss from operations of Boston & Providence properties, or in fact gave any indication of the result of operations of Boston & Providence properties.

Paragraph 14, of said Boston & Providence answer reads:

"14. Further answering to the Petition, this Corporation alleges:

That the 'Segregation of Revenues and Expenses by Leased and Mortgaged Lines' does not constitute a fair basis for the determination of the earnings of the property of Boston and Providence
497 Railroad Corporation or of charges for such operation which should in equity be borne by it, for the following reasons:

(a) Said segregation does not allocate to Boston and Providence Railroad Corporation a fair proportion of revenues derived from operation of the Debtor's properties to compensate this Corporation for the terminal services performed by it. The 'Road Haul—Terminal Formula' is admittedly based upon average terminal expenses and average expenses for road haul, both for the entire New Haven System, and the segregation is, therefore,
498 inconsistent in that it charges the actual terminal expenses at each of its terminals to the leased or mortgaged roads on whose property the terminal is located, and purports to compensate it therefor on a basis of the consideration of average charges over the entire system. The constructive mileage block arrived at by said formula necessarily would fully compensate only terminating railroads whose terminal and road haul expenses do not exceed such average terminal and road haul expenses for the entire system.

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In the alternative, this Corporation does not admit that the terminal expenses shown in said segregation as charged against the Boston and Providence Railroad Corporation on account of the operation of its properties, are correct or conclusive, and further alleges that the use factors and other factors upon which such charges are based are indecisive, and the inaccuracies therein are pyramided and multiplied in said segregation to the detriment of Boston and Providence Railroad Corporation in the application of such factors to the many accounts dealt with therein. In addition, 500
said segregation contains no formula for compensating terminating railroads for the terminal expenses incurred by them in handling passenger traffic, notwithstanding the fact that the entire amount of such passenger terminal expenses are charged directly to the railroad on whose property such operations are performed.

(b) The segregation does not recognize the value or the essential nature of the terminal services performed by Boston and Providence Railroad Corporation to the remainder of the New Haven System. Said segregation does not recognize the benefits 501
derived by Old Colony Railroad Corporation and New England Railroad Company from the services in connection with commuter and local traffic which are performed by Boston and Providence Railroad Corporation as an accommodation to said other railroad corporations, or the value or the essential nature of the services performed by Boston and Providence Railroad Corporation in connection with through passenger service, to other portions of the New Haven System; all of which terminal expenses are charged in their entirety to this Corporation.

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(c) The Petition of Bankers Trust Company does not consider the intangible elements of value of this Corporation's property which are set forth at Pages 21-22 of the 'Severance Studies' compiled by the agents of the principal Debtor and relied upon by the Plan Committee of the principal Debtor in arriving at its determination to include the assumption of the Boston and Providence lease by the New Corporation proposed in its Plan. This Corporation alleges that these elements of value are conservatively appraised in said Severance Studies and, in its opinion, are of greater value than that placed upon them in said Severance Studies or by the Plan Committee of the principal Debtor."

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Can anything be clearer than the fact that the issues so raised are the identical ones sought by Boston & Providence to be decided by the Department of Public Utilities?

(3) The result was that on October 29, 1937, the Court issued an order (Record, 3587) referring, pursuant to the statute, the question of the segregation of revenues and expenses to the Interstate Commerce Commission. The Interstate Commerce Commission was requested to transmit to the Court its recommendation as to the *method or formula* by which the segregation and allocation should be made.

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(4) The next document submitted to this Court is a short transcript of minutes of a certain court proceeding (Record, 3805). This is offered only to show that the Court suggested (Record, 3810) that the New Haven Trustees file an accounting of their administration of the Old Colony, which at that time still included the Boston & Providence leasehold; and to show that the Court cautioned all parties

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to take pains to see that the original record before the Interstate Commerce Commission was complete on the matter of the segregation formula (Record, 3814).

(5) On April 9, 1938, the Interstate Commerce Commission made its report on the segregation formula (Record, 4241). It should be noted that Mr. Bentley W. Warren was listed among counsel who participated before the Commission.

Referring to the statute providing for a segregation and allocation of earnings and expenses, the Interstate Commerce Commission said (Record, 4243): 506

> "The reason for this provision is obvious. Under our accounting classifications, accounts of a railroad system operated as such are required to be kept only for the entire system, and reflect the results of operations of the system as a whole. Separate operating revenue and expense accounts are not required to be maintained for individual mortgaged or leased lines of a system. In order to ascertain the earnings of the latter, it is necessary to divide the system earnings between its member parts."

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The Commission also said (Record, 4244):

> "Our function, as we construe the order of reference and the language of section 77(c) (10), is to recommend to the court a method or formula that will permit the ascertaining, with some certainty, of the earnings, as well as the expenses, of each mortgaged and leased line operated as an integral part of the debtor's system. Our recommendations herein are in no wise intended to express any views with respect to the use of the results obtained from

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the application of the formula or the weight to be given such results."

The Commission then proceeded to summarize your petitioners' method of segregation and allocation, to state and answer objections thereto, and to state their conclusions. At the end (Record, 4255), the Commission said:

"After considering all available data as well as the criticisms thereof, we find that the trustees' method of segregation and allocation of the debtor's revenues and expenses between and to its various
509 mortgaged and leased lines is as fair and equitable as the circumstances will permit, and so recommend to the court."

(6) Next, there was submitted to this Court, copy of the New Haven Trustees' report of their administration of the Old Colony property (Record, 4221). This was filed ten days after the Interstate Commerce Commission decision approving the method. The administration period covered was through the calendar year 1937. It will be noted that the summary appended as Exhibit 1 to this report separated items between the Old Colony, the Boston & Providence, and the Providence, Warren & Bristol,
510 though all these roads then were still part of the Old Colony estate.

(7) Returning to the matter of the segregation formula, the Court, on April 19, 1938, entered an order (Record, 4239), requiring parties to show cause at a hearing why the findings and recommendations of the Interstate Commerce Commission should not be confirmed by the Court.

(8) Thereafter, on May 28, 1938, it appearing that no party had filed exceptions to the Interstate Commerce

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Commission report, the Court entered its order No. 283 (Record, 4399) confirming and accepting the findings and recommendation of the Interstate Commerce Commission. No appeal was ever taken from this order.

"(9) Meanwhile, interested parties were given opportunity to file exceptions to the Report of the Trustees on the Old Colony administration. The Court's memorandum on said report (Record, 4511) is dated July 2, 1938. It is pointed out (Record, 4513) that objections to the accounting were interposed by special counsel for Old Colony Trustees, and these were adopted by various parties, including Boston & Providence. The Court pointed out (Record, 4515) that "* * * the filing of the New Haven petition was notice to all the world of the assumption of jurisdiction by the court and likewise notice that *those thereafter operating the property did so as officers of the court and subject to its orders.*" The Court then sketched the evolution, status and nature of the segregation method (Record, 4520-4524). In this discussion the Court said:

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> "From this starting point, the method, recognizing that the system is the sum of its parts, allocates the entire revenues and expenses of the system amongst the numerous segments which are subject to separate paramount lien and lease. Thus the accomplished result is such that the system as an entity disappears and we see nothing but a group of numerous segments which between them enjoy all the revenues and necessarily must be deemed to have assumed *all* the expenses.
>
> "But the method recognizes the obvious inequity of leaving one segment which includes a valuable and expensive facility which serves not only the 'owner-segment' but also perhaps several user-segments', to

514 bear all the expense of that singly-owned but severally used facility. Consequently the method provides how such an expense shall be allocated amongst the segments involved and provides for a charge in the nature of rental against a user-segment. This is accomplished by the application of use-factors, the detail of which it is not now necessary to discuss since the equity of the process has already received illuminating and approving discussion by the Commission in its report and has been approved by the court after hearing duly noticed without objection from any source.

515 "As a result, it must be borne in mind throughout that a user-segment cannot be relieved of the charge, or any part thereof, resulting from the application of an approved use-factor unless that charge is absorbed by some other segment. Thus individual changes in the application of the method are inconsistent with the inherent integrity of the method."

(10) It should be pointed out that on an appeal by the Old Colony in this accounting matter, the Circuit Court of Appeals for the Second Circuit, in an opinion rendered May 8, 1939 (Record, 5645), held, in connection with two issues raised concerning the allocation of revenues and 516 expenses, that the Interstate Commerce Commission had necessarily passed upon these issues when it had had the segregation formula under consideration, and that no evidence subsequently offered to alter the approved segregation method was admissible (Record, 5654, 5657).

(11) We began this discussion of pertinent proceedings in the Connecticut Court by reference to the petition for Order No. 217, which sought cessation of payments under the Boston & Providence lease. On July 2, 1938, the same day the Court made its memorandum on the Trustees' Re-

port of their Old Colony administration (Record, 4511), referred to above, the District Court also rendered a second memorandum (Record, 4497), being a decision on the petition for Order No. 217. This held that the Old Colony Trustees should reject the Boston & Providence lease, and that the New Haven estate should not be subjected to further expense on account of this lease. Incidentally, this memorandum discloses that the Boston & Providence had offered further objections to the approved segregation formula, and that these must be overruled (Record, 4508).

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(12) In due course, on July 19, 1938, the Court entered Order No. 217 (Record, 4597). This not only directed the rejection of the Boston & Providence lease, but also contained these important provisions:

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"5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate.

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"The Court reserves for further hearing the right to determine the existence and amount of any obligation of Boston and Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston and Providence therefor to the Old Colony estate and by way of subrogation to the New Haven estate."

520 (13) The remaining documents offered this Court merely complete the record on this subject. The first is the Petition for Order No. 301 (Record, 4621) being a petition of the Trustees for a charge upon the earnings and property of Boston & Providence. This was made necessary by the rejection of the Boston & Providence lease. Then comes a statement of the objection of the Boston & Providence Corporation (Record, 5009) with respect to the petition just referred to. Next is the Court's memorandum on jurisdictional objections to the petition (Record, 5257). Then comes the objections of the Boston & Providence
521 Trustees to the petition for Order No. 301 (Record, 5459). These objections directly attack the accounting and the method. These cannot readily be summarized, but must be read as set forth. Such reading will show clearly why the petition of these same Boston & Providence Trustees to the Department of Public Utilities seeks the same end which they sought in the Connecticut Court proceedings. Incidentally, the said Boston & Providence Trustees in their objections point out that the account is not a true agency account—that the theory underlying the account precludes the application of fundamental principles of accounting as between agent and principal. Finally, on April 18, 1939, the Court entered its findings and conclu-
522 sions (Record, 5561) on the petition for Order No. 301, and then, on April 20, 1939, entered its order No. 301 (Record 5575), making such charge.

(14) It is pertinent here to point out that at a hearing before the Connecticut Court on April 3 and 4, 1939, on the matter of the petition for Order No. 301, and the objections of the Boston & Providence Trustees thereto, counsel for the Boston & Providence Trustees offered to prove that no determination of this matter of charges against the Boston & Providence had been made by the

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Massachusetts Department of Public Utilities. (Minutes, pp. 84-90, and 116-122.) The evidence was excluded. An appeal from Order No. 301 is now pending.

(15) If any further evidence could possibly be needed that what the Boston & Providence Trustees seek before the Department of Public Utilities is an adjudication of a matter wholly within the jurisdiction of the Federal Court of Connecticut, that is, the question how that Court subdivides Boston Terminal Company charges applicable to that Court's use of the Terminal as between the Boston and Providence and the Old Colony, we quote the language in a letter, serving as a *duces tecum*, to the Superintendent of the Boston Terminal Company in said Department of Public Utilities proceeding. The language is:

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> "* * * and bring with you all the books and records of the New York, New Haven & Hartford Railroad Company and Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the New York, New Haven & Hartford Railroad Company, having to do with all expenses either incurred or paid by said New York, New Haven & Hartford Railroad Company or by said Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as its Trustees, for the period from June 1, 1936 up to and including the present date, together with all books and records having to do with the distribution or re-allocation of such expenses by said railroad company or said Trustees to Old Colony Railroad Company or its Trustees, or Boston & Providence Railroad Company or its Trustees, without in any way limiting the genarality of the foregoing, bring with you the account covering 'Joint Facility Rents—Net. Dr. '; New Haven

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526 Accounts numbered 278, 336, 390, 461 and 541, and all operating accounts, whether numbered or otherwise, under the general accounts entitled 'Maintenance of Way and Structures', 'Maintenance of Equipment', 'Traffic', and 'Transportation' in which were entered any items of income or expense in connection with the South Station, Boston, Massachusetts, during the period from June 1, 1936 up to the present date. Also bring with you all bills rendered to the New York, New Haven & Hartford Railroad Company or the Trustees of its property for an during the period from June 1, 1936 up to
527 the present date, including not only the bills for joint facility rents, but also all bills for operating expenses. Also bring with you, if your allocation of South Station expenses to Old Colony Railroad Company or its Trustees and Boston & Providence Railroad Corporation and its Trustees was on a percentage basis rather than on the basis of itemized bills for specific services rendered to each, all formulae, car counts, train counts, passenger counts, counts of switching operations and counts in detail of other expenditures going to show the totals from which you allocated or re-allocated such South
528 Station expenses to said Old Colony Railroad Company or its Trustees and said Boston & Providence Railroad Corporation or its Trustees, including specifically in connection with such train counts information as to whether or not each such train so counted originated on lines of the Boston & Providence, or on so-called Old Colony, New England, or New Haven lines, the mileage run of each such train on the Boston & Providence and on other parts of the New Haven system, and the number of passengers on each such train who origi-

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nated on or was destined to parts of the New Haven system other than lines owned by the Boston & Providence Railroad Corporation."

V.

CONCLUSIONS.

It is respectfully submitted that from the foregoing the following conclusions must of necessity be drawn:

(a) The sole reason assigned in the Boston & Providence Trustees' petition to the Department of Public Utilities is the attempt to influence the assessment of charges by the Federal District Court in Connecticut based upon accountings by that Court's Trustees.

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(b) It is admitted in said petition, and otherwise appears, that the New Haven Trustees, your petitioners herein, have at all times from the beginning of the reorganization proceedings up to the present been operating the properties of the Boston & Providence.

(c) That it is the New Haven Trustees, and not the Boston & Providence Trustees, who are using the Boston Terminal, in connection with their operation of the Boston & Providence properties.

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(d) That under the Bankruptcy Act the exclusive jurisdiction to ascertain and assess obligations against any property operated by said Trustees lies in the Federal Court.

(e) That the Federal Court has made such a determination in the matter.

(f) That the method of making such determination has been approved by the Interstate Commerce Commission pursuant to the very language in the Bankruptcy Act.

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(g) That there is in fact nothing for the Department of Public Utilities to adjudicate.

(h) That whether the accounting was made under a formula, or was made in the absence of a formula, would not in any way give the Department of Public Utilities jurisdiction to determine issues relating to said accounting.

(i) That even if the Department of Public Utilities should proceed and issue an order, such order still would have no effect upon the accounting in the Federal Court.

(j) That this Court would not undertake to enforce any
533 such order of the Department of Public Utilities.

(k) That it is within the sole jurisdiction of the Federal Court to divide costs between the railroads which that Court is operating in the use of the Boston Terminal.

(l) That the provisions of the Terminal charter, under which the Boston & Providence Trustees have filed their petition to the Department of Public Utilities, are not applicable in the premises.

(m) That until the Boston & Providence Trustees take over and begin to operate their railroad, the petition of said Trustees is premature.

534 (n) That there is in fact nothing to prevent the Boston & Providence Trustees, if they really desire to do so, from taking over and operating their railroad.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, Trustees, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

By A. W. BLACKMAN
Their Attorney

f) Certificate of Assessment by City of Boston of the Boston Terminal Company Properties. 535

CITY OF BOSTON
BOARD OF ASSESSORS
CITY HALL

December 11, 1939

Whom It May Concern:

The records of the Assessing Department show the following assessed title for 1939 on the property described below: 536

Card 3 Line b-3562 "Boston and Albany Railroad and New York, New Haven and Hartford Railroad Company, *Lessees* of New England Railroad Company, Boston and Providence R. R. Company and Old Colony R. R. Company"

Value:

South Station 16,000,000
Tax $638,400.00 537

/s/ J. A. COAKLEY
Chief Clerk

Notice of Appeal by Old Colony Trust Company, Trustee, From Order No. 398.

538 DISTRICT COURT OF THE UNITED STATES

DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad.

No. 16562.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

---

539 Notice is hereby given that Old Colony Trust Company, Trustee, hereby appeals to the Circuit Court of Appeals for the Second Circuit:

1. From the order of the District Court for the District of Connecticut, numbered 398 in the above proceedings entered on October 30, 1939.

By its Attorneys

/s/ OSCAR W. HAUSSERMANN
/s/ ROBERT H. DAVISON

Address: 15 State Street
Boston, Massachusetts

(Stamped on back)
Filed:
540 Clerk, U. S. District Court
Nov. 28, 1939

Cost bond on appeal is
hereby waived

/s/ H. J. WELLS
Counsel for Trustees
of The New York, New Haven
and Hartford Railroad Company

/s/ R. H. DAVISON
Counsel for Old Colony Trust Company,
Trustee

Stipulation as to Record.

541

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor. 542

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Appellant,

—against—

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company,

Appellees.

IT IS HEREBY STIPULATED AND AGREED that the foregoing 543
is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, January 5th, 1940.

OSCAR W. HAUSSERMANN AND
ROBERT H. DAVISON,
Attorneys for Appellant.

HERMON J. WELLS,
Attorney for Appellees.

544 **Clerk's Certificate.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
545 COMPANY,

Debtor.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,
Appellant,

—against—

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company,
Appellees.

546

United States of America,
District of Connecticut—ss.:

I, CHARLES E. PICKETT, Clerk of the District Court of the United States of America for the District of Connecticut, DO HEREBY CERTIFY that the foregoing is a true and correct transcript of the record of said District Court in the matter of Order No. 398 in the reorganization proceedings of The New York, New Haven and Hartford Railroad Company and in the matter of the appeal from said order, as agreed upon by the parties.

Clerk's Certificate.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed in the City of New Haven, in the State of Connecticut this fifth day of January, in the year of our Lord one thousand nine hundred forty and of the Independence of the said United States the one hundred and sixty-fourth. 547

CHARLES E. PICKETT,
Clerk.

(Seal)

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Opinion, Circuit Court of Appeals.

553

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 249—October Term, 1939.

(Argued March 6, 1940 Decided April 16, 1940.)

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,
Appellant,

—against—

554

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company,
Appellees.

Appeal from the District Court of the United States for the District of Connecticut.

555

Proceedings in reorganization of The New York, New Haven and Hartford Railroad Company, Debtor, wherein Howard S. Palmer and others, Trustees of the Debtor, petitioned for directions concerning payment of taxes and other charges for the account of the Old Colony Railroad Company and the Boston and Providence Railroad Corporation. From an order directing the trustees to withhold further payments, Webster and Atlas National Bank of Boston, Trustee for the first mortgage bondholders of the Boston Terminal Company, appeals. Reversed.

Before—SWAN, CLARK and PATTERSON, *Circuit Judges.*

556 ROBERT H. DAVISON, of Boston, Mass. (Haussermann, Davison & Shattuck and Oscar W. Haussermann, all of Boston, Mass., on the brief), for appellant.

HERMON J. WELLS, of New Haven, Conn. (J. H. Gardner, Jr., of New Haven, Conn., of counsel), for appellees.

HENRY PARKMAN, JR., Corp. Counsel, and Robert H. Hopkins, Asst. Corp. Counsel, both of Boston, Mass., *amici curiae*.

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557 CLARK, *Circuit Judge*.

In October, 1935, the New Haven Railroad filed its petition for reorganization in the District Court of the United States for the District of Connecticut. In June, 1936, its trustees rejected the lease under which the New Haven had rented the lines of the Old Colony Railroad Company. Immediately thereafter, the Old Colony petitioned for reorganization in the same court and the trustees of the New Haven were appointed trustees of the Old Colony. Since the Old Colony was wholly unable to operate its lines alone, the District Judge, pursuant to the mandate of Bankruptcy Act, §77(c) (6), 11 U. S. C. A. §205(c) (6),
558 ordered the trustees of the New Haven to continue to operate the lines of the Old Colony until further notice, "such operation to be for the account of the Old Colony." In 1938, the trustees of the Old Colony rejected its lease of the lines of the Boston and Providence Railroad Corporation. The Boston and Providence is similarly unequipped for independent operation; the District Judge therefore ordered the New Haven trustees to operate for the account of the Boston and Providence, under the same statute.

A segregation formula, allocating revenues and expenses among the various mortgaged and leased lines, was pre-

pared by the New Haven trustees and after hearings the Interstate Commerce Commission recommended its acceptance by the court. The District Court did so and we affirmed. *Palmer* v. *Palmer*, 2 Cir., 104 F. 2d 161, certiorari denied 60 S. Ct. 120. Under that formula, it appears that both the Old Colony and the Boston and Providence suffer heavy operating deficits each year. These deficits are met by the New Haven trustees out of New Haven funds; the New Haven in turn has been given a prior lien upon all the assets of the two operated roads. *Palmer* v. *Warren*, 2 Cir., 108 F. 2d 164, certiorari granted 60 S. Ct. 607. 559

Deficits met by the New Haven now exceed $20,000,000. It has become apparent that the prior lien afforded the New Haven is not a sufficient security to warrant the diversion of additional funds, without jeopardy to the claims of New Haven's own secured creditors. The New Haven trustees have made several efforts to reduce their outlays on behalf of the Old Colony and the Boston and Providence. They obtained an order permitting the abandonment of 88 unprofitable Massachusetts stations, but we reversed that order for failure to comply with applicable state laws. *Converse* v. *Massachusetts*, 2 Cir., 101 F. 2d 48, affirmed sub. nom. *Palmer* v. *Massachusetts*, 308 U. S. 79. 560

The present suit is another attempt to reduce the New Haven's contribution to the deficits of its lessors. On their petition the New Haven trustees were granted an order below instructing them to withhold further payment of real estate taxes levied upon properties of the Old Colony and Boston and Providence Railroads in Massachusetts and Rhode Island, as well as further payment of real estate taxes, franchise taxes, and bond interest owed by the Boston Terminal Company, which operates South Station in Boston. The trustee of the Boston Terminal Company's first mortgage bonds appeared below in opposition, and 561

562 now appeals.[1] Counsel for the City of Boston, which also appeared below, but did not appeal, have been permitted to file a brief as *amici curiae* herein.

The items as to which the trustees sought and received instructions in the order below concerned (a) taxes due the City of Boston, assessed upon the South Station property, amounting to $446,880; (b) franchise taxes of $13,600 due the Commonwealth of Massachusetts from the Boston Terminal Company; and (c) interest due on the first mortgage bonds of the Terminal Company of $93,842. The court also directed that taxes of approximately $689,000 assessed by various Massachusetts and Rhode Island towns
563 against the Old Colony and the Boston and Providence be not paid; but the towns were not parties below, and this part of the order is not before us on this appeal. The only items now directly involved are the taxes and interest owed because of the erection and maintenance of South Station. All of these represent current charges; prior charges have been paid by the New Haven trustees.

In 1896, the Commonwealth of Massachusetts required the railroads serving Boston from the south and west to erect and use a union station. These railroads became stockholders of the Boston Terminal Company, chartered pursuant to Chap. 516 of the Special Acts of Massachusetts of 1896. That Act required five named railroads to
564 use the station; those railroads were bound by Section 10 of the Act to pay to the Terminal Company "for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and

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[1] The Old Colony Trust Co. was trustee of the Terminal Co.'s bonds until after this appeal was taken, at which time the Webster and Atlas National Bank became successor trustee and was substituted as appellant.

ssessments which may be required to be paid by said 565
erminal company, the interest upon its bonds or other
bligations issued under the provisions of this act as the
ame shall become payable, and a dividend, not to exceed
our per cent per annum, upon its capital stock." Section
0 also provided that each of the said railroad companies
hould pay "for such use" in the proportion in which it
ad the use thereof, to be fixed by agreement, or by de-
ision of the state board of railroad commissioners, and
he payments thus required to be made by the railroad
ompanies to the terminal company "shall be deemed a
art of their operating expenses, and the supreme judicial
ourt or any justice thereof shall have jurisdiction in equity 566
o compel such payments to be made, either by mandatory
injunction or by other suitable process."

The railroads named in the statute included the Boston
nd Albany, the Boston and Providence, the Old Colony,
nd the New Haven, "being lessee of the Old Colony Rail-
oad Company." When the New York Central leased the
Boston and Albany Railroad, the statute was amended so
as to include the former, also as "lessee". Mass. Acts 1921,
c. 363. Under the legislative authorization the Terminal
Company built and has since operated South Station as a
union passenger station in Boston. The burdens of main-
tenance, as required by Section 10 of the Act, have been
allocated among the railroads, according to use, by the 567
Massachusetts Department of Utilities, which succeeded the
board of railroad commissioners. While the New Haven
has not acquiesced in the Department's findings, the pro-
portions established by the Department (30% to the Boston
and Albany, 70% to the New Haven group) are not here
in issue.

The power of an equity court to rid an insolvent rail-
road of an unprofitable lease was modified by the 1935
amendments to Bankruptcy Act, §77. The public con-
venience dictates continued operation of the leased line

568 so long as practicable, yet rejection often would leave the line in possession of a lessor with no operating staff. Accordingly, §77(c) (6) now provides that, upon rejection of a lease of a line of railroad, the lessor has the duty to begin the operation of the line, "unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce
569 Act as amended (49 U. S. C. A. §1)." While it was recognized at the time that this provision would greatly inconvenience lessees (see Hearings before House Committee on the Judiciary on H. R. 6429, 74th Cong., 1st Sess. (1935) 145, 146), there was until recently no apparent consideration of the possibility that lessees in reorganization might *have to meet operating deficits incurred* on behalf of lessors. See Meck and Masten, *Railroad Leases and Reorganization*, 49 Yale L. J. 626, 658. We are convinced, however, that under this statute the lessee or its representatives must operate the leased line until the Commission permits abandonment. Even if the indispensable costs of operation result in net loss, that loss must be met, if necessary, out
570 of the funds of the lessee. It matters not that it has "rejected" the lease, for it may "reject" only such burdens as §77(c) (6) permits it to reject. The burden of operating, come what may, survives rejection.

The District Court agreed with this view up to a point, but concluded that, since such operation must be "on or for the account of the lessor," the Act was not to be construed to require operation after the lessor's account was exhausted, and added that such a construction would bring this sub-division in conflict with the Fifth Amendment. But we think that is to read the Act in such a way as to

iolate its primary purpose, to safeguard the continued 571
peration of a railroad, even at the temporary expense of
ne road's creditors. The ultimate continuance or discon-
nuance of service is a problem for the Interstate Com-
nerce Commission or equivalent state agencies. Speaking
or the Supreme Court in the *Eighty-eight Stations* case,
Ir. Justice Frankfurter has already admonished reorgani-
zation courts that their responsibilities are shared with
ther governmental agencies. Specifically apposite to our
resent problem is his statement: "The judicial process in
ankruptcy proceedings under §77 is, as it were, brigaded
ith the administrative process of the Commission. From
he requirement of ratification by the Commission of the 572
rustees appointed by the court to the Commission's ap-
roval of the court's plan of reorganization the authority
f the court is intertwined with that of the Commission.
Thus, in §77(c) and §77(o) the power of the district courts
o permit abandonments is specifically conditioned on
uthorization of such abandonments by the Commission."
Palmer v. *Massachusetts*, supra, 308 U. S. at page 87.

Of course, the trustees, by petition to the Commission
r to equivalent state authority, may seek abandonment
f any or all of the Old Colony, Boston and Providence,
r South Station services. The Commission and the state
gencies are as responsible agencies of government as are
he courts; there is no reason to suppose that they, any 573
nore than judges, will or can order the impossible or re-
use to accept the inevitable. At any rate there the re-
sponsibility has been placed by Congress. And we think
he constitutionality of §§77(c)(6) and 77(o) is estab-
ished by the cases upholding the provisions of the Inter-
state Commerce Act, 49 U. S. C. A. §1, placing control of
abandonment of interstate railroads with the Commission.
Colorado v. *United States*, 271 U. S. 153; *Palmer* v. *Massa-
chusetts*, supra.

The New Haven trustees have in fact been meeting those

574 deficits out of funds in the New Haven estate, and the New Haven has been left simply with its prior lien on the assets of its lessors, under the statutory provision that operations shall be for the lessor's account. But the trustees now contend that, inasmuch as they have been permitted to reject the lease, they should be relieved of all obligations under the lease except those the performance of which is vitally necessary to continued operation of the road. The public convenience is sufficiently served if operation continues. So, they say, the lessee may still be relieved of the duty of paying obligations of the lessor when payment is not absolutely vital to the continuation of
575 service. Neither the payment of taxes nor the payment of interest is immediately necessary to continued operation. The bondholders are obviously impotent, for the New Haven, the Old Colony, and the Boston and Providence are all in reorganization.[2] And despite the Act of August 21, 1937, 50 Stat. 738, 28 U. S. C. A. §41 (1), denying jurisdiction to the federal district courts to enjoin the collection of state taxes, where a remedy exists in the state courts, a reorganization court may, in its discretion, continue indefinitely to hold off the tax gatherer from taking direct action against the property. *Board of Directors of St. Francis Levee Dist. v. Kurn*, 8 Cir., 98 F. 2d 394, 397, certiorari denied 59 S. Ct. 153.

576 It is contended, however, that both the taxes and the interest are "operating expenses", as the Massachusetts statute provides. But it is not necessary to pass on whether either type of payment is an operating expense, nor need we decide whether §77(c) (6), in and of itself, requires the lessee to pay such expenses not indispensable to the continuance of railroad operations. Whatever the answer to these perplexing questions, federal statutes im-

[2] Since the order was entered below, the Terminal Company has also gone into reorganization.

pose upon the New Haven trustees a direct duty to meet 577
both the tax and the interest charges.

28 U. S. C. A. §124a, enacted in 1934, declares that "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. * * *" This section was applied generally, even against the bankruptcy trustee's claim of lack of funds, in *Ingels* v. *Bolcler*, 9 Cir., 100 F. 2d 915, affirmed 308 U. S. 57. And it was held applicable 578
to a railroad's trustee under §77. *Thompson* v. *Louisiana*, 8 Cir., 98 F. 2d 108, 111.

The District Court held, however, that even if this statute ordinarily applied to railroad trustees, yet it did not apply when such officers were operating only for account of a lessor road under §77(c)(6). But we believe that, since that statute has placed the duty of operation upon the lessee, the lessee's trustees are thereby made "agents of the court" within the meaning of 28 U. S. C. A. §124a. The Old Colony, and the Boston and Providence, were they operating their lines, would have to pay their share of the taxes levied against the Boston Terminal Company. Section 25 of the Massachusetts statute of 1896 makes them 579
directly liable to the tax collector for the real estate taxes, and their duty under §10 of the same Act to pay all other taxes to the Terminal Company could be enforced directly by the taxing authorities. Now by law the duties of operation have devolved upon the New Haven, as lessee, and upon the New Haven trustees. If there existed sufficient moneys of the Old Colony and the Boston and Providence, no one could gainsay the duty of the New Haven trustees to apply those moneys to payment of the taxes. In accordance with the view we have expressed above—that operation

580 must continue until abandonment has been legally ordered, even though the New Haven trustees must go for funds to the New Haven estate—we conclude that under 28 U. S. C. A. §124a taxes legally assessed by state and local authorities must be paid by the New Haven trustees while operation continues.

Similar considerations apply to the payment of the interest on the bonds. As we have seen, the Massachusetts Act of 1896, establishing the Boston Terminal Company, made it the express duty of the Old Colony and the Boston and Providence to pay their proportionate shares of the interest on Terminal Company bonds. 28 U. S. C. A. §124 (1887), which is §65 of the Judicial Code, states that
581 "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." A criminal penalty is also provided for violation of the statute. We feel that this section exercises a compulsion to pay the interest payments similar to that of §124a for tax payments.

It is true that the federal statute speaks only of a "re-
582 ceiver or manager." We have intimated that a railroad's trustee under §77 is included within this class. *Converse v. Massachusetts*, supra, 101 F. 2d at page 51. See also *Palmer v. Massachusetts*, supra, 308 U. S. at page 90, n. 17. That would mean, at most, that the trustees of the Boston and Providence and the trustees of the Old Colony are bound to obey the Massachusetts statute, to the extent of the funds available in their respective estates. But before the funds of the New Haven can be applied to the purposes of the Massachusetts statute, we must say that the trustees of the New Haven stand in such relation to the Old Colony

and the Boston and Providence that they may be deemed the "receiver or manager" of the Old Colony and the Boston and Providence, within the meaning of §124. We think they may. The statute speaks of a "receiver or manager in possession of any property" and refers to the duty to "manage and operate such property." It cannot be gainsaid that the New Haven trustees are in possession, and managing and operating the properties, of the Old Colony and the Boston and Providence. The words "receiver or manager" are broad enough to refer to any court officer performing these functions. 583

Section 124 may not require compliance with any and all state laws, but it does require compliance with this particular Massachusetts statute. It is beyond question that state statutes relating to speed of trains, abandonment of lines, liability for negligence, the medium in which wages are paid, and other similar police regulations must be obeyed by the receivers of a railroad. *Erb* v. *Morasch*, 177 U. S. 584; *Pittsburgh & Shawmut Coal Co.* v. *Delaware & N. R. Co.*, D. C. N. D. N. Y., 289 F. 133; *Hornsby* v. *Eddy*, 8 Cir., 56 F. 461; *Peirce* v. *Van Dusen*, 6 Cir., 78 F. 693; *Converse* v. *Massachusetts*, *supra*; *Burke* v. *Morphy*, 2 Cir., 109 F. 2d 572. Compliance with these laws in no way interferes with the federal equity and bankruptcy powers upon which the reorganization of railroads is based. In so far as the Massachusetts statute requires the named railroads to use South Station, it is undoubtedly a valid exercise of the police power. *Mayor and Aldermen of Worcester* v. *Norwich & Worcester R. R. Co.*, 109 Mass. 103. 584 585

Such a statute may properly impose the costs of construction and operation upon the railroads concerned, so long as the expense is not so great as to be confiscatory, when considered in relation to the importance of the interests to be affected and to be served. *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 283 U. S. 380, 396, 51 S. Ct. 553, 75 L. Ed. 1128. The Massachusetts Act of 1896 has imposed

586 these expenses upon the named railroads by ordering them to pay to the Terminal Company all costs of operation, including bond interest on the Terminal Company bonds. Until such time as that law is amended or declared invalid, it must be obeyed. This record does not present any evidence that the charges are unreasonable or any basis for a declaration that the law is invalid.

In the view which we have taken of the case, it is not necessary for us to decide whether the provisions of the Massachusetts Act of 1896, imposing direct obligations on the New Haven, "being lessee" of the Old Colony, continue to bind the New Haven after it had rejected the lease. In
587 any event, the New Haven trustees, while operating the railroad pursuant to the court's order under §77(c)(6), are bound to pay the taxes and the interest charges for the reasons stated above.

Reversed.

588

Order for Mandate.

589

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of May one thousand nine hundred and forty.

Present—HON. THOMAS W. SWAN,
HON. CHARLES E. CLARK,
HON. ROBERT P. PATTERSON,
Circuit Judges.

590

In the Matter
of

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.,
Debtor,

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON,
Appellant.

591

Appeal from the District Court of the United States, for the District of Connecticut.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs.

Order for Mandate.

592 It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

(Back)

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

593

In re

N. Y., N. H. & HARTFORD R. R.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON,
Appellant.

ORDER FOR MANDATE.

United States Circuit Court of Appeals

594 Second Circuit

Filed May 16, 1940

D. E. ROBERTS, Clerk

Clerk's Certificate.

595

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 198, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

In the Matter

of

NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, 596
Debtor,

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON,
Appellant.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-first day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

597

D. E. ROBERTS,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 1 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1939.

No. [redacted] 120

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

HERMON J. WELLS,
Attorney for Petitioners.

J. H. GARDNER, JR.,
Of Counsel.

THE COURT PRESS, N. Y. C.

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In holding that petitioners must make payment from New Haven funds of taxes and bond interest of the Terminal Company, the Circuit Court of Appeals decided important questions of federal law which have not been, but should be settled by this Court (Rule 38(5)(b))	7
(1) No court other than the court below has interpreted Section 124a alone or in connection with Section 77(e)(6) so as (a) to enlarge beyond the requirements of State law the property out of which State taxes are payable, or (b) to make the assets of one estate liable for the payment of taxes of another separate estate. This the court below did although concededly the payment of such taxes is not immediately necessary to continued operation and if paid cannot be re-collected from the estate for the account of which operation is being conducted	8

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(2) No court other than the court below has interpreted Sec. 124 alone or in connection with Sec. 77(c)(6) so as (a) to require payments (in this case, bond interest) not immediately necessary to operation; (b) to require the payment from the trust funds of one estate of bond interest due from another, separate estate from which it cannot be re-collected, or (c) to grant a preference to the creditors of one estate in the assets of another estate 10

(3) The interpretation made by the court below of Secs. 124 and 124a taken in connection with Sec. 77(c)(6) raises constitutional questions which should receive the attention of this Court 13

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IN THE

Supreme Court of the United States

October Term, 1939.

No.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioners, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on April 16, 1940, reversing the decision of the District Court of the United States for the District of Connecticut.

Opinions Below.

The opinions of the courts below have not yet been officially reported. They will be found at pages 12-19 and pages 185-196 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 16, 1940 (R., p. 197, fol. 589). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Questions Presented.

1. Whether or not the Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. A., Sec. 124a), hereinafter referred to as "Sec. 124a", requires the trustees of the property of a bankrupt lessee railroad company, operating the property of a bankrupt lessor railroad company under Section 77(c)(6) of the Bankruptcy Act (11 U. S. C. A., Sec. 205(c)(6)), hereinafter referred to as "Sec. 77(c)(6)", for the account of the lessor's estate after rejection of the lease, to advance cash out of funds in the estate of the lessee for payment of taxes of a terminal company for which only the terminal company and the lessor are made liable by State law, the payment of such taxes not being immediately necessary to the continued operation of the lessor's property and there being no funds or other property of the lessor from which such taxes can be paid or from which the cash advanced can be recollected.

2. Whether or not Section 65 of the Judicial Code (28 U. S. C. A., Sec. 124), hereinafter referred to as "Sec. 124", requires the same trustees to advance cash for payment of interest on the terminal company's bonds, the other circumstances being the same.

3. Whether or not affirmative answers to the foregoing questions violate the Fifth Amendment to the Constitution of the United States.

Statutes Involved.

The Statutes involved are the Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. A., Sec. 124a), Section 65 of the Judicial Code (28 U. S. C. A., Sec. 124) and Section 77 of the Bankruptcy Act (11 U. S. C. A. 205). The first two Acts and the applicable portion of the third are set forth in the Appendix.

Statement.

In 1888 the Boston and Providence Railroad Corporation let its property to the Old Colony Railroad Company for a term of 99 years (R., pp. 129-143); and in 1893 the Old Colony let its property, including its leasehold interest in the Boston and Providence property, to The New York, New Haven and Hartford Railroad Company, also for a term of 99 years (R., pp. 72-80). At that time the City of Boston was served by the lines of the two lessors and by the New England Railroad Company and the Boston and Albany Railroad Company. After the lease of 1893, the properties of the two lessors were operated by the New Haven as parts of its railroad system.

In 1896 The Boston Terminal Company was incorporated by an Act of the Massachusetts legislature (Massachusetts Acts and Resolves, 1896, Ch. 516)* to provide a union station for passengers on railroads entering the southerly part of the City of Boston.

* The applicable portions of the Act are set forth in the Appendix.

That Act required the Boston and Albany, the New England and the two lessors, whose properties served the area, to use the terminal for all their terminal passenger business in Boston (Secs. 2, 9) and to pay the amounts necessary to cover the Terminal Company's expenses, including its taxes and bond interest, in proportion to their use of its facilities (Sec. 10). The requirements of use and payment were also laid upon the New Haven but were limited to its use of the terminal as lessee of the Old Colony—it owned no property serving Boston.* And later when the Boston and Albany let its property to the New York Central, the Act was amended so as to include the latter, also as "lessee" (Massachusetts Acts, 1921, Ch. 363). In the meantime the New England had been merged into the New Haven (R., p. 16, fol. 46; Massachusetts Acts and Resolves, 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, Sec. 4). Thus the New Haven and the New York Central became the only users of the terminal, all other companies enumerated in Section 2 of the charter having been leased or merged. There was no use of the terminal over the former New England line for the period here involved (R., p. 16).

Upon approval on October 23, 1935, of the petition of the New Haven for reorganization there came into the custody of the District Court, as a part of the system of lines operated by the New Haven, the lines of the Old Colony and the Boston and Providence. Continued operation of the system was provided for (R., pp. 44-52) and trustees were appointed (R., pp.

* The four other railroads are named as such in the Act, but the New Haven is described as "* * * the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company" (Sec. 2).

53-56). Both the Old Colony and the Boston and Providence leases have been rejected by the New Haven and Old Colony Trustees respectively (R., pp. 66, 113) and the New Haven Trustees have continued to operate both lines for the account of the former lessors under orders so providing (*Palmer* v. *Palmer*, 2 Cir., 104 F. (2d) 161, cert. den. 60 S. Ct. 120; *Palmer* v. *Warren*, 2 Cir., 108 F. (2d) 164, affd. sub. nom. *Warren* v. *Palmer*, 60 S. Ct. 865 (1940); R., p. 69, fol. 206; p. 72, fol. 214; pp. 81-82, fols. 242-244; p. 87, fol. 260; p. 92, fol. 276; p. 112, fol. 335), pursuant to Section 77(c)(6) (R., p. 186, fols. 557, 558).* In 1931 the Department of Public Utilities of Massachusetts determined under Section 16 of the Act the proportion of use of the terminal at seventy per cent. for the lines operated by the New Haven (including the Old Colony and Boston and Providence) and thirty per cent. for the line operated by New York Central (Boston and Albany) (R., p. 153, fol. 465). No reapportionment has been made since that time.

The operations by the New Haven Trustees of the two lines formerly leased to the New Haven have been conducted at a large deficit. Indeed, losses incurred in the operation of Old Colony and Boston and Providence properties exceeded $20,000,000 for the period from October 23, 1935, to and including December 31, 1939 (R., p. 13, fol. 37; p. 37, fol. 109; and see R., pp. 97-107, 114-122, 144-153). Payments by the New Haven Trustees of bond interest and taxes of the Terminal Company were swelling the steadily

* The District Court entered its order approving Old Colony's petition for reorganization in the New Haven proceedings on June 3, 1936 (R., pp. 81-83). The Boston and Providence has been in reorganization under Section 77 since August 5, 1938, in the District Court of the United States for the District of Massachusetts (R., pp. 126-128).

mounting advances of cash from the New Haven estate for the account of Old Colony and Boston and Providence at a rate of approximately $800,000 per year (R., p. 6, fol. 18; p. 7, fol. 21; pp. 9, 10, fols. 27, 28; p. 32, fols. 95, 96) and it became apparent that the properties of the two lessors were not sufficient security to warrant the diversion of additional cash from the New Haven estate without jeopardy to the New Haven's own creditors (R., p. 187, fol. 560). Accordingly, the New Haven Trustees filed a petition on October 19, 1939, stating that in their opinion they should make no further advances of cash for payment of Boston Terminal taxes and bond interest for the account of Old Colony and Boston and Providence estates (R., p. 10, par. 7). The District Court, after hearing, agreed (R., pp. 12-19) and entered its order directing that the payments should be withheld (R., p. 20).* The Circuit Court of Appeals reversed because it construed Section 124a, Section 124 and Section 77(c)(6) as requiring these payments to be continued (R., pp. 193-196), despite the fact they were not immediately necessary to continued operation of the Old Colony and Boston and Providence properties (R., p. 192, fol. 575; p. 17, fol. 50) and despite the further fact that the cash for the payments would be diverted from the New Haven's estate without prospect of its ever being recovered (R., p. 187, fol. 560; pp. 193-194, fols. 579, 580; p. 196, fol. 587; p. 13, fol. 38).

The decision turns on Sections 124a and 124. The Court of Appeals' construction of these sections was urged upon it not by the appellants (who did not even

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* On petition of holders of bonds of the Terminal Company filed November 3, 1939, proceedings for its reorganization under Section 77 of the Bankruptcy Act were instituted in the United States District Court for the District of Massachusetts (Docket No. 63870).

cite them), but by counsel for the City of Boston in a brief *amici curiae* offered just before argument. Petitioners opposed the filing of this brief because the City, although appearing in the trial court, had failed to appeal. They asked opportunity to reply should the brief be received. The Court denied this request but reserved ruling on acceptance of the brief and did not announce such ruling until decision of the case.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In reversing the order of the District Court.

(2) In holding that petitioners must advance cash for payment of taxes and bond interest of The Boston Terminal Company.

(3) In so construing and applying Section 124a, Section 124 and Section 77(c)(6) as to require petitioners to advance cash for payment of said taxes and interest out of funds in the New Haven estate.

(4) In holding that its said construction and application of said statutes did not violate the Fifth Amendment to the Constitution of the United States.

(5) In violating said amendment by requiring petitioners to advance cash for payment of said taxes and interest out of funds in the New Haven estate.

Reasons for Granting the Writ.

In holding that petitioners must make payment from New Haven funds of taxes and bond interest of the Terminal Company, the Circuit Court of Appeals

decided important questions of federal law which have not been, but should be settled by this Court (Rule 38(5)(b)).

> *(1) No court other than the court below has interpreted Section 124a alone or in connection with Section 77(c)(6) so as (a) to enlarge beyond the requirements of State law the property out of which State taxes are payable, or (b) to make the assets of one estate liable for the payment of taxes of another separate estate. This the court below did although concededly the payment of such taxes is not immediately necessary to continued operation and if paid cannot be re-collected from the estate for the account of which operation is being conducted.*

Heretofore, under Section 124a, this Court has decided merely that a bankrupt estate, operated by a trustee, is liable for taxes that the State could have collected from *the particular business or property upon which the tax is laid* if the bankrupt instead of the trustee had been operating it (*Boteler* v. *Ingels*, 308 U. S. 57 [1939]); and a similar result has been reached by the Circuit Courts of Appeal for the Eighth and Ninth Circuits (*Board of Directors of St. Francis Levee District* v. *Kurn*, 8 Cir., 98 F. (2d) 394, 397 [1938], cert. den. 305 U. S. 647 [1938]; *Thompson* v. *Louisiana*, 8 Cir., 98 F. (2d) 108, 111, 112 [1938]; *Ingels* v. *Boteler* (see *supra*), 9 Cir., 100 F. (2d) 915, 919, 920 [1938]). The present case is different. Here the liability is that of the former lessor companies and the Terminal Company (all of which are in bankruptcy), not the New Haven estate. The liability is not attributable to any New Haven

business conducted for the New Haven estate by petitioners or to any New Haven property. Instead it is attributable to business conducted "for the account of" the estates of Old Colony and Boston and Providence (Sec. 77(c)(6)). Moreover, payment of the taxes in question is admittedly not presently necessary to continued operation of the lessors' properties (R., p. 192, fol. 575) which is being conducted now, as in the past, without interruption; and payment of the taxes would represent a cash loss to New Haven creditors that could not be re-collected from the estates which are liable for the taxes and for which operation is being carried on (R., p. 187, fol. 560; p. 13, fol. 38). This requirement of payment is made irrespective of the fact that ultimate payment of the taxes to the State is assured through the lien accruing upon the property against which the tax is laid; and irrespective of the fact that petitioners have rejected the Old Colony lease and are operating the property of that company and the Boston and Providence solely because of the orders of the District Court in the absence of operating ability of those companies.

No decision of this Court or of any court other than the court below has construed Section 124a alone or in conjunction with Section 77(c)(6) to enlarge beyond the requirements of State law the fund out of which State taxes are payable. But the court below held that Section 124a required petitioners to pay Terminal Company taxes out of any property found in their hands even if such property belonged to others and was no more applicable by State law to the payment of the taxes than are petitioners' own

private dwellings.* This novel holding presents important questions of federal law under Section 124a and under Section 77(c)(6).

(2) *No court other than the court below has interpreted Section 124 alone or in connection with Section 77(c)(6) so as (a) to require payments (in this case, bond interest) not immediately necessary to operation; (b) to require the payment from the trust funds of one estate of bond interest due from another separate estate from which it cannot be re-collected, or (c) to grant a preference to the creditors of one estate in the assets of another estate.*

Section 124 differs from Section 124a in that it lays down requirements as to management and operation, not payment. Accordingly, this Court has held that a federal receiver or trustee is bound by valid State laws relating to the operation of trains at a specified rate of speed (*Erb* v. *Morsch*, 177 U. S. 584 [1900]), the abandonment of railroad service (*Palmer* v. *Massachusetts*, 308 U. S. 79 [1939]) and the giving of a bond to observe the requirements of State laws as to operation, including a bond for taxes (*Gillis* v.

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* In so holding the court below failed to cite its earlier opinion, *Dulberg* v. *Zankel*, 2 Cir., 67 F. (2d) 534, 537, handed down before Section 124a was passed, and announcing a general rule, said to be "self-evident", that deficits from the operation of unprofitable property in a receiver's hands should not be met from the earnings of separate property also operated by the receiver. The court there said:

"Assuming that current taxes assessed against property of Nestwood Estates, Inc. [owner of the unprofitable property] would be entitled to priority over creditors of its receiver in the distribution of property *belonging to it*, it must appear that property of *that corporation* is in the receiver's hands for distribution before any such question of priority can arise." (Italics supplied.)

California, 293 U. S. 62 [1934]). Although each of these decisions cost the receiver or trustee whatever cash the particular operation required, nevertheless the obligation principally dealt with was one of physical operation rather than the payment of interest on securities. Thus in *Palmer* v. *Massachusetts*, *supra*, the New Haven Trustees necessarily were forced to incur whatever extra expense was entailed by the continued operation of the unprofitable stations they were forbidden to abandon without State authority.

But the present case does not involve the payment of expenses necessary to continued operation. Admittedly operation into the terminal for the account of Old Colony and Boston and Providence estates will continue whether or not the Terminal Company bond interest is paid.* No decision of this Court or of any court other than that below has dealt with the obligation of receivers or bankruptcy trustees operating property of other estates than their own and for the account of such other estates to pay from their own funds expenses not immediately necessary to the continued operation of such other estates which they can never re-collect.

The novelty of the decision below is emphasized by the fact that it requires petitioners to pay bond interest of the Terminal Company during the New Haven reorganization proceedings. Even if the Massachusetts Act of 1896 had required the New Haven to guarantee for all time the punctual payment of such interest, that obligation would be no more enforceable after bankruptcy than any other New

*Such operation is in fact continuing despite petitioners' compliance with the order of the District Court below. They are paying currently all expenses necessary to continued operation (R., p. 10, pars. 7, 8; p. 192, fol. 574).

Haven guaranty. Instead it would be dealt with as a general claim in the New Haven plan. And if liability for the interest did not survive the Old Colony lease, that would end the matter so far as the New Haven estate is concerned. But the court below did not even stop to consider whether the New Haven Company was legally liable to make payment under State law. It held that such a step was unnecessary (R., p. 196) and decreed payment from funds in the New Haven estate despite the fact that the New Haven's own bondholders and the holders of obligations guaranteed by the New Haven are still waiting for payment of interest (R., p. 13, fol. 38) which is clearly due by the law of all States in which the New Haven properties are operated.

It is evident that one of the purposes of the Bankruptcy Act is to prevent preference and to provide for the fair distribution of the assets of a debtor. This is, of course, true of the reorganization sections of the Act, even though the property distributed is usually in the form of the securities of the new corporation rather than in the property of the debtor. The interpretation made by the court below of Section 124, taken in connection with Section 77(e)(6) has the effect of providing for the payment of interest on the bonds of one debtor out of funds belonging to the estate of a second and separate debtor, in preference to the claims for principal and interest of the mortgage bondholders of the second debtor.

The ruling of the court below based squarely, as it is, upon Section 124 and Section 77(e)(6) of the Bankruptcy Act, merits the attention of this Court because of its novelty and importance.

(3) *The interpretation made by the court below of Sections 124 and 124a, taken in connection with Section 77(s)(6), raises constitutional questions which should receive the attention of this Court.*

Taking the record as we find it, there is no need here to consider whether or not the Fifth Amendment to the Constitution of the United States would be violated by Congressional legislation requiring the New Haven estate to pay such *necessary* expenses of operation of Old Colony and Boston and Providence estates as *could ultimately be recovered* out of their properties. Although such a question probably would be appropriate for consideration by this Court, the present record presents a question even more serious and important. In this case the court below so construed and applied Sections 124a and 124 in conjunction with Section 77(c)(6), as to require the New Haven estate to pay even the expenses of Old Colony and Boston and Providence that are *not necessary* to their continued operation and *cannot be recovered* from the operated properties. And in the concluding paragraph of its opinion it stated:

"In the view which we have taken of the case, it is not necessary for us to decide whether the provisions of the Massachusetts Act of 1896, imposing direct obligations on the New Haven, 'being lessee' of the Old Colony, continue to bind the New Haven after it had rejected the lease. In any event, the New Haven trustees, while operating the railroad pursuant to the court's order under Sec. 77(c)(6), are bound to pay the taxes and the interest charges for the reasons stated above" (R., p. 196, fols. 586, 587).

Thus the court held that petitioners must pay the charges from New Haven funds whether or not the New Haven Company was legally liable for them.

In making provision for continued operation through Section 77(c)(6) Congress exercised powers granted to it by the Constitution to regulate commerce among the several States (Article I, Section 8, Clause 3) and to establish uniform laws on the subject of bankruptcies (Article I, Section 8, Clause 4); *Warren* v. *Palmer*, 60 S. Ct. 865 (1940); see also *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 671, 672 (1935). But these powers, like other great substantive powers of Congress, are subject in their exercise to the Fifth Amendment which forbids Congress to deprive any person of life, liberty or property without due process of law or to take private property for public use without just compensation (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 589 (1935); *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336 (1893); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451 (1937); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 347 (1935); *Chicago, Rock Island & Pacific R. Co.* v. *United States*, 284 U. S. 80, 96, 97 (1931)).

Decisions of this Court have placed beyond question the test it will apply in determining the validity of legislation in this connection. The requirement is:

> "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

Nebbia v. *New York*, 291 U. S. 502, 525 (1934);
Railroad Retirement Board v. *Alton R. Co.*, *supra*, 295 U. S. 330, 348, Note 5 (1935);
Heiner v. *Donnan*, 285 U. S. 312, 326 (1932);
Chicago, Rock Island & Pacific R. Co. v. *United States*, *supra*, 284 U. S. 80, 96, 97 (1931);
Great Northern R. Co. v. *Washington*, 300 U. S. 154, 160 (1937);
Nashville, C. & St. L. Ry. v. *Walters*, 294 U. S. 405, 429 (1935);
Chicago, M., St. P. & O. R. Co. v. *Holmberg*, 282 U. S. 162, 167 (1930);
Liggett Co. v. *Baldrige*, 278 U. S. 105 (1928).*

In the present case "the object sought to be attained" by Section 124 and by Section 77(c)(6) is continued operation of Old Colony and Boston and Providence properties into the terminal during reorganization proceedings, and the "object sought to be attained" by Section 124a is to subject to taxes *the business conducted for and the property of those companies* during such proceedings. The "means selected" by the legislation, as construed by the court below, were the payment of current Terminal Company taxes and bond interest out of another estate, although such payment was found not to be immediately necessary to operation. Accordingly, petitioners are here seeking an authoritative determina-

* The same test is applied to the several states under the Fourteenth Amendment (*Nebbia* v. *New York*, *supra*, 291 U. S. 502, 525 (1934); *Heiner* v. *Donnan*, *supra*, 285 U. S. 312, 326 (1932)). Since this Court cites cases interchangeably under both amendments (*Railroad Retirement Board* v. *Alton R. Co.*, *supra*; *Heiner* v. *Donnan*, *supra*) we do likewise herein.

tion whether or not the legislation as construed below in the light of the facts of record discloses any "real and substantial relation" between the means adopted and the object sought to be attained. They are also seeking an authoritative determination whether or not such legislation as construed and applied is "unreasonable, arbitrary or capricious" in requiring advances of cash that cannot be recovered if advanced, and the payment of which is not immediately necessary to continue the operations involved.

The ruling of the court below that petitioners must make these payments even if the New Haven Company is now under no legal liability to do so is a further circumstance not to be lost sight of in assessing the nature of the exaction required of the New Haven's secured and unsecured creditors. But even if the New Haven Company is liable for the charges, it is in bankruptcy, and present payment by petitioners, if made at all, must be made from trust funds. Any preference in these funds that is granted to the Terminal Company must be justified or condemned under the Fifth Amendment, by recourse to the facts and decisions already noticed (see *Doty* v. *Love*, 295 U. S. 64, 74 (1935)). The fact that payment was exacted without regard to liability serves to emphasize the peremptory and rough-shod operation of the statutes as interpreted below and raises further doubt as to their constitutionality.

These doubts cannot be resolved in favor of validity by suggesting, as did the court below (R., p. 191, fol. 572) that petitioners can relieve themselves of the charges by seeking and obtaining appropriate authority to abandon all or a part of the operation into the terminal. The issue is not whether there shall be

payment or abandonment. Instead it is: Must petitioners advance cash for payment of the charges out of the New Haven estate? Indeed it seems difficult to believe that any appropriate authority, State or federal, would find that public convenience and necessity permitted abandonment of the terminal because charges for interest upon its bonds are out of proportion to the business transacted on its property. To do so would burn the ship to get rid of the rats. The obvious remedy here is reorganization, not abandonment. This process, as noted, has already been initiated. And where a middle course (immediate reorganization) is feasible, the constitutionality of a statute cannot be sustained merely by suggesting an impracticable alternative,—yet the court below did just this. And in so doing it at least gave rise to a possibility that payment of the charges would place the Terminal Company in a position to obtain dismissal of its reorganization proceedings whether or not it is over-capitalized.

CONCLUSION.

In shifting the burden of Terminal Company taxes and bond interest to the New Haven creditors the opinion below dealt with questions of interpretation of Sections 124a, 124 and Section 77(c)(6), and questions as to their constitutionality under the Fifth Amendment that never have been but should be passed upon by this Court. Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorney for Petitioners.

J. H. GARDNER, JR.,
Of Counsel.

Appendix.

Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. A., Sec. 124a):

"Sec. 124a. STATE TAXATION; BUSINESS CONDUCTED BY RECEIVERS, TRUSTEES OR OTHER COURT OFFICERS SUBJECT TO.

Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

Section 65 of the Judicial Code (28 U. S. C. A., Sec. 124):

"Sec. 124. (Judicial Code, section 65.) MANAGEMENT OF PROPERTY BY RECEIVERS. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or man-

ager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

Section 77(c)(6) of the Bankruptcy Act (11 U. S. C. A., Sec. 205(c)(6)):

"(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49."

Massachusetts Acts and Resolves, 1896, Ch. 516:

"Sec. 2 [as amended by Acts 1921, Ch. 363]. The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, its lessee, the New York Central Railroad Company, the New England Railroad Company, the Boston and Provi-

dence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for or purchase and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act."

"Sec. 9. All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land herein-above authorized to be taken, for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce this provision; but said terminal company may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station hereinafter provided for, as may be reasonably necessary for their respective use.

"Sec. 10. Said railroad companies hereby required to use said union station shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments

which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum upon its capital stock. Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree, the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all of the railroad companies at any time, or by the board of railroad commissioners upon like application at intervals of not less than three years. The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies, and the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process."

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 120.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT.

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J. H. GARDNER, JR.,
Of Counsel.

THE COURT PRESS, N. Y. C.

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(a) Facts and opinion in the Pittsburgh Railways Case.

The decision in the *Pittsburgh Railways Case* was handed down about two weeks later than the decision below and was not reported until after the filing of the petition in the present case. It reversed an order of the United States District Court for the Western Dis-

trict of Pennsylvania which had directed the trustees of the property of a lessee street railway company, operating a street railway system under Section 77B and Chapter X of the Bankruptcy Act, to pay federal income taxes and state income, capital stock and corporate loan taxes falling due during the proceedings by numerous lessors and other underlying companies whose properties were operated by the trustees under leases and operating agreements that the trustees had neither affirmed nor disaffirmed.[1] As in the present case the taxes were not due and owing by the trustees, but were due and owing by the underliers. The order was reversed because it required the trustees to make payment of the underliers' taxes from cash in their hands produced by system operation despite an absence of proof that each underlier had contributed sufficient net earnings to the trustees from which its taxes could be paid. The court left no doubt as to its attitude on this score for it said (111 F. 2d at p. 935):

> ". . . . Until that is done [viz: until proof of earnings is made] any order made by the court would have no factual basis and would, therefore, be arbitrary and possibly confiscatory.
>
> * * *
>
> "The appellees give much weight to the fact that the trustees have in their possession funds derived, as they allege, almost wholly from the operation of the underliers' property, sufficient to pay all the taxes. They contend that it is wasteful of the trust estate to permit interest and penal-

[1] The opinion of the District Court has not yet been officially reported, but see 394 C. C. H. 10,861 Par. 9761 for an unofficial report.

ties to accumulate by reason of non-payment of these taxes. If, however, by reason of the ultimate disaffirmance of the leases the taxes should never become payable, as such, out of the debtor's estate, and if the amount claimed as taxes should be found to exceed the sum justly due for use and occupation the trustees would be in error in so applying the funds in their possession. Furthermore the debtor may succeed in substantiating its claims against some of the underliers.'"[2]

Thus in the Third Circuit no order will be entered that *might* result in taking the property of one person to pay the debts of another *(In re Reorganization of Pittsburgh Rys. Co.)*, but in the Second Circuit an order must be entered that *will* do just that (*Webster National Bank of Boston* v. *Palmer, et al.*). No clearer conflict can be imagined either in reasoning or result.

A petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit in the *Pittsburgh Railways Case* has now been filed with this Court. The reasons relied on by that petition are (1) conflict with the decision in the present case, and (2) the decision of important questions of Federal law which have not been, but should be, settled by this Court.

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[2] In the present case, as the petition shows (p. 5) and Respondent's brief admits (pp. 4-5), operation of Old Colony and Boston and Providence properties, whose leases have been rejected, has produced *no* net earnings in petitioners' hands for the payment of the taxes. Instead operation of these properties has produced a deficit in excess of $20,000,000 which petitioners have paid from the earnings of other properties. They are seeking prior liens therefor on Old Colony and Boston and Providence properties (R., pp. 186, 187).

(b) The conflict in the meaning and application of Section 124a.

At page 9 of its brief Respondent says no conflict is present because the Circuit Court of Appeals for the Third Circuit failed to mention Section 124a of 28 U. S. C. A. We pass Respondent's tacit assumption here that a conflict can arise only from words, not acts, and its further tacit assumption that an appellate court should cite all statutes in the field of its opinion, whether deemed controlling or not. We do this because the record in the *Pittsburgh Railways Case* and the opinion of the District Court both show beyond doubt that the decision of the Circuit Court of Appeals in that case is as much a decision under Section 124a as is the decision below.

In fact the whole controversy was set off by Section 124a (r., p. 13, par. 15)[3] when the trustees of the Railway Company filed their petition with the reorganization court for advice as to the payment of underliers' and other taxes, alleging that they were operating the system (r., pp. 8, 9) and that taxes were due by the underliers (r., pp. 10-16). The report of the special master quoted the federal statute (r., p. 86), but held nevertheless that the trustees were not obligated to pay underliers' taxes, the leases and operating agreements not having been adopted and there being no evidence to show that the payment of such taxes would not amount to a preference (r., pp. 89, 90, par. 24).[4] Also, the opinion of the District Court (rejecting the

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[3] "r" refers to the record in the *Railways Case;* "R" to the record in the present case.

[4] Paragraph 24 of the master's report is set forth in the Appendix hereto.

master's conclusion) rested squarely upon Section 124a, which it quoted, and upon receivership decisions of the type cited in the present petition (pp., 8, 9). And upon appeal the brief for the underliers (appellees) relied upon the statute and upon *Boteler* v. *Ingels*, 308 U. S. 57 [1939] decided under it. In opposition, the brief of certain tort creditors (appellants) contended that it did not apply to require the payment of taxes of a third person. With this latter view the appellate court evidently agreed. Accordingly it is settled in the Third Circuit that Section 124a does not enlarge the fund out of which taxes are payable or reach the property of persons not liable for the tax. In the Second Circuit an exactly opposite view of the statute is enforced.

(c) The conflict in the meaning and application of the Bankruptcy Act (Sec. 77(c)(6)) and like provisions of Section 77B and Chapter X.

Respondent also purports to find a lack of conflict from the fact that the Pittsburgh Railways system was operated under Section 77B and Chapter X of the Bankruptcy Act which do not specify any requirement, like that in subdivision (c)(6) of Section 77 of the same Act, that under certain circumstances the lessee shall "continue operation [of a leased line] on or for the account of the lessor" until abandonment is authorized (Brief, p..9). The express statement of such a rule would, of course, be out of place in a statute relating principally to the reorganization of business corporations which do not operate "leased lines". With this fact in mind Congress quite evidently intended reorganization courts in proceedings under Chapter X to apply well settled equity receivership rules in solving problems that inevitably arise

during the reorganization of street railway systems comprised in part of leased lines, for all powers and duties of receivership courts not inconsistent with the statutory scheme are expressly given to reorganization courts by the Act (11 U. S. C. A. Chapter X, Section 515).[5] This makes a consideration of equity principles necessary in order to determine whether they resemble or differ from those laid down by Section 77(c)(6).

Many years ago it was settled by this Court that a receiver, acting as he does as custodian of property for the court appointing him and not as agent for the parties (*Quincy M. P. R. Co.* v. *Humphreys*, 145 U. S. 82 [1892]; *Union Trust Company* v. *Illinois Midland R. Company*, 117 U. S. 434 [1886]), is not bound by existing executory contracts or leases unless he adopts them (*Quincy M. P. R. Co.* v. *Humphreys, supra; St. Joseph and St. L. R. Company* v. *Humphreys*, 145 U. S. 105 [1892]; *United States Trust Company* v. *Wabash Western Railway*, 150 U. S. 287 [1893]). It is equally clear, and this Court has long held, that the respective owners of portions of the system of an embarrassed railroad company must bear their own expenses and receive their own earnings accrued during

---

[5] Section 515. "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

See also Section 77B(c)(2) of the Bankruptcy Act (11 U. S. C. A., Sec. 207(c)(2)) for similar earlier provisions.

the time they are being administered by a court (*Union Trust Company* v. *Illinois Midland R. Co., supra*). A leading case on this subject in the lower federal courts is *Penn Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721, 728, 729, 731, C. C. A. 2d, 1912, in which the court said:

> "If a receiver elect to adopt a lease, he becomes vested with the title to the leasehold interest and a privity of estate is thereby created between the lessor and him by which he becomes liable upon the covenant to pay rent. . . . But unless and until he does adopt a lease, there is no such privity and no liability upon the lease."
>
> * * *
>
> "The same principles which give the acquiescing lessor net earnings instead of rentals make it liable for deficiencies when there are no net earnings. In other words, we think that the receiver must be considered as operating the leased road *for the account of the lessor.*"

The rule so announced has come to be known as the "net earnings rule". It had the early approval of this Court, as noted above, and the support of early authority elsewhere (*Ames* v. *Railway Co.*, 74 Fed. 335, 344, C. C. D. Neb. 1896; *Mercantile Trust Company* v. *The Farmers' Loan and Trust Co.*, 81 Fed. 254, 258, C. C. A. 8th 1897, cert. den. 168 U. S. 710). It has since been repeatedly approved in the lower federal courts (*Penn Steel Co.* v. *New York City Ry. Co.*, 216 Fed. 458, 463, C. C. A. 2d 1914, cert. den. 238 U. S. 632; *American Brake Shoe and Foundry Company* v. *New York Railways Co.*, 282 Fed. 293, 298, D. C. N. Y. 1920, affd. 282 Fed. 523, C. C. A. 2d 1922, dismissed, 262

U. S. 736; *Westinghouse Electric and Mfg. Co.* v. *B. R. T. Company*, 6 F. 2d 547, C. C. A. 2d 1925). It was applied in the reorganization of street railway companies under Section 77B in *In re Connecticut Co.*, 95 F. 2d 311, 316, C. C. A. 2d 1938, cert. den. *sub nom. Connecticut Railway & Lighting Co.* v. *Connecticut Co.*, 304 U. S. 571 [1938], and it now applies in the reorganization of such companies under Chapter X (*In re Reorganization of Pittsburgh Railways Company*, at pp. 934, 935).

The essence of the rule is expressed in the statement of Judge Noyes quoted above that "the receiver must be considered as operating the leased road *for the account of the lessor;*" and *Congress incorporated it verbatim into Section 77* through the direction that in the event of rejection and inability of the lessor to operate, the lessee shall continue operating the leased road *"for the account of the lessor"* until abandonment is authorized by the Commission (Sec. 77(c)(6)). Thus in appropriate cases the rule as to leased line operation by reorganization trustees is the same whether the operation takes place under Section 77, Section 77B or Chapter X of the Bankruptcy Act.[6] Congress stated it specifically in Section 77 because it believed the public interest required its application to all railroad bankruptcies where there are leased lines, and failed to state it specifically in Section 77B

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[6] Even apart from special provisions, the reasons for this are clear for:

> "Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankrupcty should be read in harmony with the existing system of equity jurisprudence of which it is a part." (*Securities and Exch. Comm.* v. *U. S. R. & Imp. Co.*, U. S. [1940].)

and Chapter X because the field of corporate reorganization with which it was there dealing is not limited to a class of corporations that usually operate leased lines. But the rule of Section 77(c)(6) though not specifically mentioned was nevertheless incorporated into Section 77B and Chapter X, through the general provision as to receivership powers, for use wherever the public interest required, and the Circuit Court of Appeals for the Third Circuit was right in applying it to a street railway system composed in part of leased lines that had to be operated.

It follows that no distinction favorable to Respondent can be spun from the fact that the Pittsburgh Railways trustees were not operating the leased lines under Section 77(c)(6) (*cf.* Respondent's Brief, p. 9). The conflict in the two decisions is clear. They are incompatible in the matter of liability of reorganization trustees for taxes of underlying companies operated in proceedings under the Bankruptcy Act. Also it is impossible to read the *Pittsburgh Railways Case* without reaching the conclusion that the Circuit Court of Appeals for the Third Circuit would have disagreed violently with the holding below that Petitioners must pay Terminal Company bond interest from cash in the New Haven estate.

(d) The difference of opinion on matters of constitutional law.

Moreover, the statement that the order of the Pennsylvania District Court directing payment was "arbitrary and possibly confiscatory" (111 F. 2d at p. 935) immediately brings to mind the Fifth Amendment to the Constitution of the United States (see Petition, pp. 13, *et. seq.*) and suggests strongly a dif-

ference of opinion in the two Circuits on the points of constitutional law decided by the court below and raised by the present petition.

(2) *Respondent's brief in opposition shows no reason for withholding the relief sought by the petition.*

It hardly seems necessary to say much in answer to the bulk of Respondent's brief in opposition. Perhaps the Massachusetts Act of 1896 represents, in some of its aspects, an exercise of the State's police power; perhaps, to borrow Respondent's language (Brief, p. 11), "so long as [it] . . . is in force it must be obeyed." But the statute does not run against the property of petitioners as New Haven trustees and it does not authorize, through Sections 124a, 124 or 77(c)(6) or otherwise, any raid on the property of third persons. The court below held it bound petitioners merely because it bound Old Colony and Boston and Providence. It is with this view that we disagree; and there is no need to agree or disagree with Respondent's claims as to the source of the State's power to enact the statute or the requirement of obedience to that power.

The question in the present case is out of what funds shall the taxes and bond interest be paid, not what person shall pay them. No statute settles that question. The Fifth Amendment does. Also, there is no question of abandonment as a palliative to petitioners' dilemma if the judgment below stands (*cf.* Respondent's Brief, pp. 7, 11, 12). Respondent contents itself with mere assertion of the possibility of such relief and does not even answer our argument on this score (Petition, pp. 16, 17). Nor do we find any comfort in the hint that Terminal bondholders will foreclose (Respondent's Brief, p. 11). We wish they

would, but their own self-interest will doubtless continue to restrain them from such action and permit the reorganization of their company to go forward. (Petition, pp. 6, 17). And if practical considerations pointed the other way—if there was a real possibility or probability of voluntary foreclosure action by Terminal Company bondholders—that fact would hardly furnish a reason for payment of these bondholders *from New Haven funds.*

In short, we find nothing in the brief in opposition that shows any reason why this Court should not grant the petition. We still stand on that petition as stating sufficient reasons for review, and we now urge the conflict in the Second and Third Circuits as an additional ground for relief.

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Attorney for Petitioners.

J. H. GARDNER, JR.,
Of Counsel.

APPENDIX.

"24. It is uncertain that any of the leases or operating agreements will ever be accepted by the trustees. Unless they be accepted, their covenants for payment of taxes will not bind the estate to pay the taxes of the underlying companies as administration expenses. There is no showing that the amounts, if any, owing to the respective companies for the net earnings of their properties or for the use of their properties by the trustees are proportionate to their taxes or even that in every case they are as much as their taxes. Payments of taxes regarded as payments for such earnings or use might give some companies a greater proportion of their dues than others and might even overpay some. If the debtor's claims (paragraph 17) against some of the underlying companies be meritorious, they may affect the equities. There does not appear to be any exigency which might justify the risk of effecting preferences or overpayments. It does not seem practicable to deal with the underliers' taxes in the mass, or to dispose of them separately upon the facts shown. At present the taxes of the underliers should not be paid by the trustees."

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 120.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

BRIEF FOR PETITIONERS.

HERMON J. WELLS,
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J. H. GARDNER, JR.,
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IN THE

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October Term, 1940.

No. 120.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The District Court's opinion (R., pp. 12-19), which is not officially reported, is in the record at pages 12-19. The opinion of the Circuit Court of Appeals (R., pp. 185-196) is reported at 111 F. (2d) 215, sub. nom. *Webster and Atlas Nat. Bank of Boston* v. *Palmer, et al.*

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 16, 1940 (R., p. 197, fol. 589). Jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Questions Presented.

1. Whether or not the Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. A., Sec. 124a), hereinafter referred to as "Sec. 124a", requires the trustees of the property of a bankrupt lessee railroad company, operating the property of a bankrupt lessor railroad company under Section 77(c)(6) of the Bankruptcy Act (11 U. S. C. A., Sec. 205(c)(6)), hereinafter referred to as "Sec. 77(c)(6)", for the account of the lessor's estate after rejection of the lease, to advance cash out of funds in the estate of the lessee for payment of taxes of a terminal company for which only the terminal company and the lessor are made liable by State law, the payment of such taxes not being immediately necessary to the continued operation of the lessor's property and there being no funds or other property of the lessor from which such taxes can be paid or from which the cash advanced can be recollected.

2. Whether or not Section 65 of the Judicial Code (28 U. S. C. A., Sec. 124), hereinafter referred to as "Sec. 124", requires the same trustees to advance cash for payment of interest on the terminal company's bonds, the other circumstances being the same.

3. Whether or not affirmative answers to the foregoing questions violate the Fifth Amendment to the Constitution of the United States.

Statutes Involved.

The statutes involved are the Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. A., Sec. 124a), Sec. 65 of the Judicial Code (28 U. S. C. A., Sec. 124) and Sec. 77 of the Bankruptcy Act (11 U. S. C. A., Sec. 205). The first two Acts and the applicable portion of the third are set forth in the Appendix.

Statement.

In 1888 the Boston and Providence Railroad Corporation let its property to the Old Colony Railroad Company for a term of 99 years (R., pp. 129-143); and in 1893 the Old Colony let its property, including its leasehold interest in the Boston and Providence property, to The New York, New Haven and Hartford Railroad Company, also for a term of 99 years (R., pp. 72-80). At that time the City of Boston was served by the railroad lines of the two lessors and of the New England Railroad Company and the Boston and Albany Railroad Company. After the lease of 1893, the properties of the two lessors were operated by the New Haven as parts of its railroad system.

In 1896, after both leases had been executed, The Boston Terminal Company was incorporated by an Act of the Massachusetts legislature (Massachusetts Acts and Resolves, 1896, Ch. 516)[1] to provide a union station for passengers on railroads entering the southerly part of the City of Boston. That Act required the Boston and Albany, the New England and the two lessors, whose properties served the area, to use the terminal for all their terminal passenger business in Boston (Secs. 2, 9) and to pay the amounts necessary to cover the Terminal Company's expenses, including its taxes and bond interest, in proportion to their use of its facilities (Sec. 10). The requirements of use and payment were also laid upon the New Haven, but were limited to its use of the terminal as lessee of the Old Colony—it owned no property serving Boston.[2]

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[1] The applicable portions of the Act are set forth in the Appendix.

[2] The four other railroads are named as such in the Act, but the New Haven is described as ". . . the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company" (Sec. 2).

And later when the Boston and Albany let its property to the New York Central, the Act was amended so as to include the latter, also as "lessee" (Massachusetts Acts, 1921, Ch. 363). In the meantime the New England had been merged into the New Haven (R., p. 16, fol. 46; Massachusetts Acts and Resolves, 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, Sec. 4). Thus the New Haven and the New York Central became the only users of the terminal, all other companies enumerated in Section 2 of the charter having been leased or merged. There was no use of the terminal over the former New England line for the period here involved (R., p. 16).

Upon approval on October 23, 1935, of the petition of the New Haven for reorganization there came into the custody of the District Court, as a part of the system of lines operated by the New Haven, the lines of the Old Colony and the Boston and Providence. Continued operation of the system was provided for (R., pp. 44-52) and trustees were appointed (R., pp. 53-56). Both the Old Colony and the Boston and Providence leases have been rejected (R., pp. 66, 113) and the New Haven Trustees have continued to operate both lines for the account of the former lessors under orders so providing (*Palmer* v. *Palmer*, 104 F. (2d) 161, C. C. A. 2d, 1939, cert. den. 308 U. S. 590 [1939]; *Palmer* v. *Warren*, 108 F. (2d) 164, C. C. A. 2d, 1940, affd. sub. nom. *Warren* v. *Palmer*, 310 U. S. 132 [1940]; R., p. 69, fol. 206; p. 72, fol. 214; pp. 81-82, fols. 242-244; p. 87, fol. 260; p. 92, fol. 276; p. 112, fol. 335), pursuant to Sec. 77(c)(6) (R., p. 186, fols. 557, 558).[3] In 1931 the Department of Public

[3] The District Court entered its order approving Old Colony's petition for reorganization in the New Haven proceedings on June 3, 1936 (R., pp. 81-83). The Boston and Providence has been in reorganization under Sec. 77 since August 5, 1938, in the District Court of the United States for the District of Massachusetts (R., pp. 126-128).

Utilities of Massachusetts determined under Section 10 of the Act the proportion of use of the terminal at seventy per cent. for the lines operated by the New Haven (including the Old Colony and Boston and Providence) and thirty per cent. for the line operated by the New York Central (Boston and Albany) (R., p. 155, fol. 465). No reapportionment has been made since that time. The accounting for these operations by the New Haven trustees required by Sec. 77(c)(6) has been accomplished by means of a segregation of expenses and revenues approved by the Interstate Commerce Commission (R., p. 95, and see Sec. 77(c)(10)) and by the District Court (R., p. 96) and confirmed in *Palmer* v. *Palmer, supra.* In said accounting the aforesaid 70% is charged to Old Colony and Boston and Providence operations in proportion to use (R., p. 10, fol. 28).

The operations by the New Haven Trustees of the two lines formerly leased to the New Haven have resulted in a large deficit. Indeed, losses incurred in the operation of Old Colony and Boston and Providence properties exceeded $20,000,000 for the period from October 23, 1935, to and including December 31, 1939 (R., p. 13, fol. 37; p. 37, fol. 109; and see R., pp. 97-107, 114-122, 144-153). Payments by the New Haven Trustees of bond interest and taxes of the Terminal Company were swelling the steadily mounting advances of cash from the New Haven estate for the account of Old Colony and Boston and Providence at a rate of approximately $800,000 per year (R., p. 6, fol. 18; p. 7, fol. 21; pp. 9, 10, fols. 27, 28; p. 32, fols. 95, 96) and it became apparent not only that the properties of the two lessors were not sufficient security to warrant the diversion of additional cash from the New Haven estate without jeopardy to the New Haven's own creditors (R., p. 187, fol. 560), but that recovery of amounts already advanced was doubtful.

Accordingly, the New Haven Trustees filed a petition on October 19, 1939, stating that in their opinion they should make no further advances of cash for payment of Boston Terminal taxes and bond interest for the account of Old Colony and Boston and Providence estates (R., p. 10, par. 7). At the hearing on this petition there were represented, besides petitioners, Old Colony Railroad Company, the trustee of the mortgage securing the bonds of that Company, a protective committee of its shareholders, a group of insurance company holders of New Haven bonds, a group of mutual savings banks holding New Haven and Old Colony bonds, two trustees under mortgages securing issues of New Haven bonds, a protective committee of holders of underlying New Haven bonds, the Commonwealth of Massachusetts, the City of Boston, and the predecessor of respondent (R., pp. 24, 25). The District Court, after hearing, issued its opinion (R., pp. 12-19) and entered its order (No. 398) directing that the New Haven trustees should withhold the payments (R., p. 20).[4] The predecessor of respondent, trustee under the mortgage securing the bonds of the Terminal Company, was the only one who appealed the decision. The Circuit Court of Appeals reversed because it construed Sec. 124a, Sec. 124 and Sec. 77(c)(6) as requiring these payments to be continued (R., pp. 193-196), despite the fact they were not immediately necessary to continued operation of the Old Colony and Boston and Providence properties (R., p. 192, fol. 575; p. 17, fol. 50) and despite the further fact that as the Circuit Court said, "It has become apparent that the prior lien af-

[4] On petition of holders of bonds of the Terminal Company filed November 3, 1939, proceedings for its reorganization under Sec. 77 of the Bankruptcy Act were instituted in the United States District Court for the District of Massachusetts (Docket No. 63870).

forded the New Haven is not sufficient security to warrant the diversion of additional funds, "without jeopardy to the claims of the New Haven's own secured creditors" (R., p. 187, fol. 560. See also pp. 193-194, fols. 579, 580; p. 196, fol. 587; p. 13, fol. 38).

The decision turns on Secs. 124a and 124, which sections were not argued before the Court of Appeals. That Court's construction of these sections was urged upon it not by the appellants (who did not even cite them), but by counsel for the City of Boston in a brief *amicus curiae* offered just before argument. Petitioners opposed the filing of this brief because the City, although appearing in the trial court, had failed to appeal. They asked opportunity to reply should the brief be received. The Court denied this request, but reserved ruling on acceptance of the brief and did not announce such ruling until decision of the case.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In reversing the order of the District Court.

(2) In holding that petitioners must advance cash to the estates of the Old Colony and Boston and Providence for payment of taxes and bond interest of The Boston Terminal Company.

(3) In so construing and applying Sec. 124a, Sec. 124 and Sec. 77(c)(6) as to require petitioners to advance cash for payment of said taxes and interest out of funds in the New Haven estate.

(4) In holding that its said construction and application of said statutes did not violate the Fifth Amendment to the Constitution of the United States.

(5) In violating said amendment by requiring petitioners to advance cash for payment of said taxes and interest out of funds in the New Haven estate.

Summary of Argument.

The essential point is that petitioners may not be compelled to pay out of the New Haven estate taxes and bond interest of the Terminal Company for which neither the New Haven nor petitioners as trustees of its property are liable by State law. The court below held that petitioners must do this, although the operations into the terminal are not in any sense New Haven operations, but are operations required for the account of Old Colony and Boston and Providence whose properties are being operated by petitioners under Sec. 77(c)(6) following rejection of the Old Colony lease.

The court below rested its decision squarely on Sec. 124a and Sec. 124. The first named section does not by its terms apply to petitioners in their situation here. Moreover, the general purpose of that section is to subject properties such as those of Old Colony and Boston and Providence to applicable State laws respecting taxes despite the appointment of federal receivers or trustees. The purpose of the latter section is to assure that physical operation of property shall be in accordance with the applicable State laws. Nothing in either section shows any intention to extend State laws beyond their stated scope so as to reach cash in another (the New Haven) estate of

which petitioners happen to be trustees, and use it to discharge the liabilities of the Old Colony and Boston and Providence whose cash and credit are insufficient to meet their own obligations. The fact that the funds of these two estates are insufficient to pay their debts does not require petitioners to dip into another estate to pay them, where immediate payment is not necessary to operation.

Petitioners are currently paying all expenses necessary to operate Old Colony and Boston and Providence properties into the terminal under Sec. 77(c)(6). The payment of the taxes and bond interest are not necessary to such operations and nothing in Sec. 77(c)(6) requires petitioners to pay them. Our case might rest here.

However, even if the New Haven corporation had been made liable by State law for the payment of bond interest after termination of the lease—even if it had guaranteed the payment of such interest—the obligation of the New Haven corporation to pay it would give rise merely to a general claim against the New Haven in its reorganization proceedings. To discharge it now in cash would be to prefer Terminal Company bondholders over the New Haven's secured and general creditors and interfere *pro tanto* with the exercise of Federal equity and bankruptcy powers upon which the reorganization of railroads is based. Nothing in Sec. 124 requires or justifies such an interference.

The holding of the court below that petitioners must pay Terminal Company taxes and bond interest out of cash in the New Haven estate violates the due process clause of the Fifth Amendment to the Constitution of the United States.

The argument to follow may be summarized under four headings:

(1) Neither the New Haven nor petitioners, as trustees of its property, are using the terminal *as lessees* of the property of Old Colony, and therefore the Massachusetts Act of 1896 does not make them liable to the Terminal Company for its bond interest or taxes.

(2) Sec. 134a, whether considered alone or in conjunction with Sec. 77(c)(6), does not make cash in the New Haven estate available for the discharge of liabilities of Old Colony and Boston and Providence estates to the Terminal Company for the latter's taxes, the payment of which is not immediately necessary to continued operation of lines of the former lessors.

(3) Sec. 124, whether considered alone or in conjunction with Sec. 77(c)(6), does not make cash in the New Haven estate available for the discharge of indebtedness of Old Colony and Boston and Providence estates to the Terminal Company for the latter's bond interest, the payment of which is not immediately necessary to continued operation of the lines of the former lessors.

(4) The interpretation made by the court below of Secs. 124 and 124a taken in connection with Sec. 77(c)(6) violates the due process clause of the Fifth Amendment to the Constitution of the United States.

(5) The public interest is not involved here since continued operation of the property is not threatened and since the Commonwealth is not deprived of its right to payment of the taxes.

Argument.

(1) Neither the New Haven nor petitioners, as trustees of its property, are using the terminal as LESSEES *of the property of Old Colony, and therefore the Massachusetts Act of 1896 does not make them liable to the Terminal Company for its bond interest or taxes.*

A. Introductory.

The court below held that petitioners, as trustees of the property of the New Haven, were liable for Terminal Company bond interest and taxes whether or not "the provisions of the Massachusetts Act of 1896, imposing direct obligations on the New Haven 'being lessee' of the Old Colony, continue to bind the New Haven after it[5] had rejected the lease" (R., p. 196). Thus the opinion below has this curious result: Cash in the New Haven bankrupt estate may be reached for the payment of obligations of third persons *for which neither the New Haven nor its estate is made liable by State law.* We urge that a claimant to cash during reorganization must ordinarily prove first a liability of the bankrupt or its estate and, second, some compelling reason for present payment. We also urge, especially as to bond interest in this case, that the Terminal Company or its representatives would have no right to present payment even if liability of the New Haven corporation could be shown to exist under State law. We discuss the State law at this point in order that this Court may be fully advised as to its content, and also because

[5] This is an inaccurate use of language. Petitioners, not the New Haven, rejected the lease (R., p. 66, fol. 198).

the clear absence of any liability under that law will demonstrate the rough shod operation of the Circuit Court of Appeals' interpretation of the federal law involved in this case.

B. The Act imposed liability upon the New Haven only as lessee of Old Colony, and the lease has ended.

Section 9 of the Act required all "*said railroad companies*" to use the station "*for all of their terminal passenger business in Boston*",[6] and Section 10 provided that "Each of said railroad companies shall pay for such use of said station * * * in the proportion in which it has the use thereof, * * *". Section 25, in similar vein, required payment by "said railroad companies" of real estate taxes on property of the Terminal Company used by them, each "in the proportion in which it then [viz., at time of assessment] has the use" of the property. To be liable under the act as drawn, the company sought to be charged must be one of "said railroad companies" and must also be using the terminal. As 1939 bond interest and taxes are here in issue, it is necessary to apply the language of the statute to the facts existing in that year. Who were then included in the words "said railroad companies" using the terminal? The answer to this question is first given by Sec. 2 of the Act which listed the railroad companies originally involved.

That section named first, and without qualification, the four proprietary companies whose properties were to have a physical connection with the terminal—

[6] All italics are supplied.

viz., "the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company". It then listed the New Haven with an important qualification—viz., "the New York, New Haven and Hartford Railroad Company, *being the lessee of the Old Colony Railroad Company*". If the intention had been to include the New Haven as such and without qualification, the words just italicized would have been omitted from the Act. The description of the New Haven as lessee is both significant and controlling. As the District Court stated:

> "The inference is clear that under the charter [the Act of 1896] it was not intended that the use made of the terminal by the Old Colony should be paid for once by the Old Colony and again by the New Haven, as lessee. Rather the inclusion of the New Haven as a participant was designed to fasten upon the New Haven the obligations imposed by the charter with respect to the use made of the terminal by the Old Colony and Boston and Providence *while the New Haven was under obligation as the lessee of these properties*" (R., p. 14, fol. 41).

The distinction between proprietary and leased lines under the Act was neither inadvertent nor unconsidered. On the contrary, a dual classification of "said railroad companies" was made deliberately in Section 2 when the Act was first passed in 1896. It was deliberately perpetuated in 1921 when, after the New York Central had leased the Boston and Albany, that section was amended to include the Central *as lessee*. The relation of lessees to the Act was incidental to its main object that the railroad companies whose lines were operated into the terminal should

use it and be liable for the charges. Lessees were obliged to make payment only because and while they were operating the proprietary lines which were required to use the facilities and to pay for such use. And if further support for this view is needed it may be found in Sec. 4 of the Act which provided that in case the Terminal Company mortgage was foreclosed with a resulting deficiency "said railroad companies" would be held liable to pay such deficiency, "having regard to the use which they *or their lessees* may have respectively had of the mortgaged property".

Petitioners, as trustees of the property of the New Haven have rejected the Old Colony lease under which the New Haven operated Old Colony and Boston and Providence properties before the commencement of its reorganization proceedings (R., p. 66), and the Circuit Court of Appeals has already pointed out in earlier litigation that "the [district] court has continued the original joint operation of a leased road under Sec. 77(c)(6), *after the lease has ended*" (*Palmer* v. *Palmer, supra*, 104 F. (2d) 161, 165; R., pp. 81, 82, par. 2; R., p. 87, par. 6). The New Haven is no longer "lessee of the Old Colony Railroad Company" under Sec. 2 of the Act of 1896 and no longer liable as such to the Terminal Company under its charter. In fact the New Haven corporation does not operate into or use the terminal in any way. The petitioners do, but only as they are required by Sec. 77(c)(6) to operate the Old Colony and Boston and Providence properties in the public interest and for the account of those former lessors, the latter being unable to operate. And the order of the Massachusetts Department of Public Utilities in 1931 (R., p. 155, fol. 465) did not even purport to fix a liability upon the New Haven; it merely fixed a proportion of

use as between the two lessee companies then using the terminal and quite properly left the matter of liability to Sec. 10 of the Act.

C. PETITIONERS ARE NOT, AND THEY NEVER WERE, LESSEES OF OLD COLONY. THEY DECLINED TO ADOPT THE LEASE AND ARE OPERATING TRAINS INTO THE TERMINAL, NOT IN BEHALF OF THE NEW HAVEN ESTATE, BUT FOR THE ACCOUNT OF THE ESTATES OF OLD COLONY AND BOSTON AND PROVIDENCE.

Certainly petitioners, as trustees of the property of the New Haven, never were lessees of Old Colony, for "a lease, being property *cum onere*, does not pass to a trustee in bankruptcy unless he adopts it" (*Palmer* v. *Palmer*, *supra*, 104 F. (2d) 161, 163)[7] and this they have categorically refused to do (R., p. 66, fol. 198). The use they make of the terminal is in no sense a part of the operation of the property of the New Haven—a fact that would be evident to all had Old Colony and Boston and Providence taken over the operation of their own properties instead of leaving them to be operated for their account by petitioners under the requirements of Sec. 77(c)(6). And the inability of those Companies to take possession of their lines and operate them should not falsify the relations between the roads themselves or disguise the result (*Palmer* v. *Warren*, *supra*, 108 F. (2d) 164, affirmed, *Warren* v. *Palmer*, *supra*, 310 U. S. 132).

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[7] The rule is the same in receivership. *Quincy M. P. R. Co.* v. *Humphreys*, 145 U. S. 82 [1892]; *St. Joseph & St. L. R. Co.* v. *Humphreys*, 145 U. S. 105 [1892]; *U. S. Trust Co.* v. *Wabash Western Ry.*, 150 U. S. 287 [1893]; *Penn. Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721, 728, 729, 731, C. C. A. 2d, 1912.

Under the Act of 1896 mere use of the terminal by petitioners in behalf of Old Colony and Boston and Providence under the Act of 1896 of course obligates the estates of the two former lessors to pay the price fixed for that use. No one denies this, as the court below has pointed out. But we do deny any liability of the New Haven estate to the Terminal Company under the Act of 1896 on account of operations required to be conducted by petitioners for other estates. The relationship between petitioners and these other estates is not even as close as that of an operating agent to his principal. If petitioners are agents for anyone, they are agents for the court (Opinion below, R., p. 193, fol. 578), not the parties (*Quincy M. P. R. Co.* v. *Humphreys, supra*, 145 U. S. 82; *Union Trust Co.* v. *Ill. Midland R. Co.*, 117 U. S. 434 [1886]; *Penn. Steel Co.* v. *New York City Ry. Co., supra*, 198 Fed. 721, 728; *Westinghouse Elec. & Mfg. Co.* v. *B. R. T. Co.*, 6 F. (2d) 547, 550, C. C. A. 2d, 1925). As to Old Colony and Boston and Providence lines, petitioners are merely the operators under orders of the reorganization court. But even if they were more than this—if they were known agents of the former lessors and operating the properties as such agents—they would not be liable for the debts to third persons incurred in the operation of their principals' business (*Feldman* v. *American Palestine Line*, 18 F. (2d) 749, 750, C. C. A. 2d, 1927; 1 Mechem on Agency, 999, sec. 1357; 3 C. J. S. 119, sec. 215). Unlike the known agent they are receiving no benefit from terminal operations as the segregation so clearly shows. In fact it is costing them large sums of money, the recollection of which has become very doubtful. If voluntary agency does not make for liability under these circumstances, surely a more remote and involuntary relationship should not do so.

(2) *Sec. 124a, whether considered alone or in conjunction with Sec. 77(c)(6), does not make cash in the New Haven estate available for the discharge of liabilities of Old Colony and Boston and Providence estates to the Terminal Company for the latter's taxes, the payment of which is not immediately necessary to continued operation of lines of the former lessors.*

A. Introductory.

Thus we have seen that no Massachusetts statute makes the New Haven estate liable here. Accordingly, any liability must rest on the basis of Federal law. The question arises whether any Federal statute produces that effect.

The Circuit Court of Appeals expressly placed its opinion squarely upon Sec. 124a. We are therefore presented with a direct question of statutory interpretation and must look carefully both at the language of Sec. 124a, taken in connection with Sec. 77 of the Bankruptcy Act, and at the Congressional background of the passage of this Section.

B. Sec. 124a does not by its terms apply to the present situation.

The conclusion of the court below that cash in the New Haven bankrupt estate must be expropriated in payment of tax liabilities of others is rested squarely upon the requirement of Sec. 124a that:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall * * * be subject to all State and local taxes applicable to such business the same

as if such business were conducted by an individual or corporation * * *".

Since the taxes here involved are taxes on Old Colony business, and on that of its former lessor, the Boston and Providence, it becomes important to determine who it is that is "authorized by said court to conduct [that] business", and also out of what funds these taxes should be paid. Let us look at the situation presented.

Sec. 77(c)(2) provides that the trustees of a railroad in reorganization shall have the power to operate "the business of the debtor". Subsection (c) (4) further provides that the trustees so appointed shall file schedules and information to disclose "the conduct of the debtor's affairs".

Pursuant to these subsections of Sec. 77, Messrs. Palmer, Loomis and Sawyer were appointed by the District Court (R., pp. 85, 86) as "Trustees of the property of the Old Colony Railroad Company". They were given, in accordance with the terms of the above subsections, power to operate "the business of the Old Colony Railroad Company" (R., pp. 86, 87). Their ultimate responsibility is evidenced by the court's requirement of a bond from them *as Old Colony Trustees* (R., p. 86).

Accordingly it is Messrs. Palmer, Loomis and Sawyer *as Old Colony Trustees*, and as Old Colony Trustees alone, who are, in the words of Sec. 124a, "authorized by said court to conduct [the Old Colony] business" and who do conduct it.

Thus, paragraph 8 of the order appointing the Old Colony Trustees provides that the three above persons

> *"as Trustees of Old Colony Railroad Company* shall by this order have authority and power to

designate employees of Old Colony Railroad Company or of The New York, New Haven and Hartford Railroad Company to execute and deliver *in their stead* and as their agents checks, drafts, vouchers, orders, contracts and any or all instruments incidental to their duties and that such instruments, so executed by the agents of said Trustees shall bind said Trustees to the same extent as though their signatures respectively had been affixed thereto" (R., p. 91).

In sharp contrast to this responsibility of the *Trustees of the Old Colony* for the conduct of *its* business and the application of its funds, is the position of the *New Haven* Trustees,—who happen, for reasons of convenience approved by the Interstate Commerce Commission,[8] to be the same three individuals. Let us examine the relationship of the New Haven Trustees to the Old Colony property and business as it is defined in Sec. 77 and in the orders of the District Court.

Sec. 77(c)(6) provides that if a lease of a line of railroad is rejected, it shall be the duty of the lessor "to *operate* the said *line*", unless it shall be found impracticable for the lessor to do so, "in which event it shall be the duty of the lessee to continue *operation* on or *for the account* of the lessor * * *".

By Order of June 3, 1936, the Court approved the petition of Old Colony for reorganization under Sec.

[8] There is no requirement in Sec. 77 that the Trustees of a former lessor line in reorganization under Sec. 77 must be the same individuals as those who are Trustees of the property of the former lessee. Thus, in the reorganization of the Erie Railroad Company, different individuals were appointed trustees of the Northern Railroad of New Jersey, a line which bears exactly the same relationship to the Erie as the Old Colony does to the New Haven.

77; and, pursuant to request in the petition of Old Colony, said order provides that the Trustees of the New Haven estate should possess and "*operate* the [Old Colony's] *property*, such operation to be *for the account* of" the Old Colony. By the order appointing trustees of Old Colony, the court decreed that the New Haven Trustees should "*possess* and *operate* the properties of Old Colony Railroad Company such operation to be *for the account* of Old Colony Railroad Company or the Trustees of its property" (R., p. 87).

Thus, the provisions, both of Sec. 77 and of the Court's orders entered pursuant thereto, have made clear the distinction between the status and duty of the Trustees of the New Haven [former lessee] to "*operate* the [formerly leased] *line*" and that of the Old Colony Trustees, who "conduct the business of the debtor". (See Sec. 77, subdivisions (c)(2) and (c)(4).)

Accordingly, it is submitted that it is the Old Colony Trustees, and not the New Haven Trustees, who are "authorized by said Court to conduct [the] business" to which the State taxes referred to in Sec. 124a are applicable—*i.e.*, the Old Colony's business. It is they who must determine the basic policy to be followed as, for example, whether appropriate steps should be taken before the Court and Interstate Commerce Commission to abandon all or part of the operations in the interest of the Old Colony's estate and its ultimate reorganization. (Cf. Petition for Abandonment of Boston Group, I. C. C. Finance Docket No. 12614, in which the New Haven Trustees joined only as operators.)

Similarly as to the Boston and Providence business, in its order directing the Old Colony Trustees to

reject the Boston and Providence lease the District Court provided for continued operation by the New Haven Trustees of the property of Boston and Providence for the account of that corporation pursuant to subdivision (c)(6) of Sec. 77 "but without expense to the New Haven estate" (R., p. 112).

Shortly thereafter a creditor of the Boston and Providence filed a petition under Sec. 77 of the Bankruptcy Act for its reorganization in the District Court of the United States for the District of Massachusetts, alleging among other things the fact, essential to approval of such a petition (Sec. 77(a) and (m)), that the Boston and Providence "is a common carrier by railroad *engaged in* the transportation of persons and property in interstate commerce" (R., p. 126), and also alleging that the United States District Court for the District of Connecticut had ordered the operation of the property of the Boston and Providence to be continued by the New Haven Trustees for the account of the Boston and Providence (R., p. 125). These allegations were admitted by the Boston and Providence (R., p. 125) and the Massachusetts Court having been satisfied that the petition complied with Sec. 77 and had been filed in good faith approved it (R., p. 127) and provided for the appointment of Trustees of the property of the Boston and Providence (R., p. 128). Subsequently that court entered an order appointing Bentley W. Warren and Charles W. Mulcahy trustees of the property of the Boston and Providence. These appointees were confirmed by the Interstate Commerce Commission and on October 18, 1938 qualified by filing bonds and since that time have been acting as trustees. (*In the Matter of Boston and Providence Railroad Corporation*, No. 62413,

District Court of the United States, District of Massachusetts, Order of August 22, 1938.)

Accordingly, it is Messrs. Warren and Mulcahy, and not the petitioners, who are in the words of Sec. 124a "authorized by said court to conduct [the Boston and Providence] business" and who do conduct it.

The application of Sec. 124a to a situation like the present never occurred to anyone prior to the filing of the brief of the City of Boston as *amicus curiae* directly before the oral argument in the Circuit Court of Appeals. Petitioners objected to the filing of this brief and were never given an opportunity to answer it.

That Sec. 124a is inapplicable to a situation like the present, is indicated by the fact that in the only other comparable case which has been found, the Judge in handing down his opinion did not even consider it necessary to mention Sec. 124a. In the *Interborough* case, which was decided a year after the enactment of Sec. 124a and which is discussed more fully below, Circuit Judge Mack (sitting as a District Judge) refused to require the payment of taxes on a leased line out of the estate of the lessee.

C. Even if Sec. 124a should be held to apply to New Haven Trustees as operating Old Colony and Boston and Providence lines, it does not require that Old Colony and Boston and Providence taxes must be paid out of New Haven funds.

We admit that the words used clearly describe, and were intended to subject, Messrs. Palmer, Loomis and Sawyer as Trustees of the Old Colony (who, it must be clearly borne in mind, are not the petitioners here)

and Messrs. Warren and Mulcahy as Trustees of Boston and Providence to "all State and local taxes applicable to such [Old Colony and Boston and Providence] business"; and to require that those taxes be paid by such Trustees out of Old Colony and Boston and Providence funds respectively. Similarly, we admit that the words also clearly describe, and would be applicable to require Messrs. Palmer, Loomis and Sawyer, as New Haven Trustees (who are the petitioners here), to pay out of New Haven funds all State and local taxes applicable to the New Haven's business. But no taxes applicable to the New Haven's own business are involved here. The Circuit Court of Appeals has interpreted the statute so as to require the *New Haven* Trustees to pay, out of assets held by them for *New Haven* creditors, taxes applicable to *Old Colony* and *Boston and Providence* business.

But even if Sec. 124a should be held to apply to New Haven Trustees as operating Old Colony and Boston and Providence lines, *it does not follow from anything in that statute that petitioners must take the property of a separate estate of which they also happen to be trustees and use it to discharge the liabilities of the estates of the former lessors whose cash and credit are insufficient to meet their own obligations.*

It is to be noted that Sec. 124a does not provide that the taxes of the business carried on shall be paid out of the separate assets of the trustee or agent so authorized by the court. The most that can be said by the respondents is that the statute is silent as to the source from which the funds are to be obtained to pay the taxes. This silence, it is submitted, was perfectly natural. Congress hardly thought it necessary to say that the taxes applicable to a business should be paid by that business, and not by somebody else.

If, on the other hand, the intention had been to create a novel principle of taxation requiring payment to be made from the separate estate of the operating trustee, an express provision to this effect would certainly have been included. Not only is there no such provision, but Sec. 124a clearly indicates that no such result was to be achieved. On the contrary, it makes provision for taxes applicable to the business "the same as if such business were conducted by an individual or corporation * * *".

The Circuit Court of Appeals, after the citation of Sec. 124a in the *amicus curiae* brief, immediately jumped to the conclusion that the taxes must be paid out of any property found in petitioners' hands even if such property was held in trust by them for others and was no more subject by State law to the payment of the taxes than are petitioners' own private dwellings and bank accounts.

The holding of the court below was not based upon any failure to distinguish between the various properties and estates being operated by petitioners. It knew, and indeed pointed out, that the Old Colony system (including Boston and Providence property) was producing an enormous deficit in excess of $20,000,000 which had been met from New Haven funds (R., p. 187, fol. 560), that the tax liabilities were those of Old Colony and Boston and Providence estates (R., p. 193, fol. 579) and that their payment out of trust funds in the New Haven estate would further jeopardize the claims of the New Haven's own secured creditors who since the inception of the New Haven reorganization proceedings had been sustaining a loss, not a benefit, from Old Colony system operations (R., p. 187, fols. 559, 560). In so holding the court below failed even to cite its earlier opinion, *Dulberg* v.

Zankel, 67 F. (2d) 534, 537, C. C. A. 2, 1933, handed down it is true before Sec. 124a was passed, but announcing a general rule, said to be "self-evident", that deficits from the operation of unprofitable property in a receiver's hands should not be met from the earnings of other property also operated by the receiver. The court there said:

> "Assuming that current taxes assessed against [the unprofitable] property of Nestwood Estates, Inc. would be entitled to priority over creditors of its receiver in the distribution of property *belonging to it*, it must appear that property of *that corporation* is in the receiver's hands for distribution before any such question of priority can arise. * * *
>
> "The receivership embraced property of several distinct corporations. Although one receiver was appointed for all, he held the property of each as a trust estate for the benefit of its own creditors and shareholders."

The decision of Judge Mack in the receivership of the Interborough Rapid Transit Company, filed May 29, 1935, is highly apposite here not only because it was decided a year after Sec. 124a was enacted but also because of the similarity of the circumstances there involved. In that case the City of New York claimed that the court should require the payment out of the Interborough estate, of City taxes on the Manhattan Elevated Lines, which had been leased to the Interborough long prior to the receivership of the two companies. The Court said (Vol. VII, Interborough Rapid Transit Company-Manhattan Railway Company Printed Receivership Record, p. 6237):

> "Insofar as the City asks immediate payment by the Interborough Receiver of all past due

Manhattan taxes, the petition must likewise be denied. The earnings of Manhattan Railway Company's lines presently in the hands of the Interborough Receiver are apparently at least less in amount than the overdue Manhattan taxes. Until the question of affirmance or disaffirmance of the lease is decided, the City clearly has no right to demand that *Interborough* funds be used to discharge liens on *Manhattan* property. Cf. *Dulberg* v. *Zankel*, 67 F. (2d) 534 (C. C. A. 2d, 1933). As an appeal to the exercise of the Court's discretion, the application will not be granted at this time."

It is to be noted that the court refused to require the Interborough estate to pay taxes of the Manhattan, even though the Interborough receivers had not then disaffirmed the lease of the Manhattan lines. It is implicit in the above opinion that, if the lease of the Manhattan had already been disaffirmed by the Interborough, funds of the Interborough estate could not have been required to pay Manhattan taxes; otherwise the court's opinion has no meaning. *A fortiori* in the instant case, where the lease of the Old Colony properties was disaffirmed by the New Haven Trustees in 1936 and where prior taxes and operating charges in behalf of the Old Colony and Boston and Providence have been advanced by the New Haven estate to the extent of some $20,000,000, the New Haven estate should not be required to advance further funds for the Old Colony's and Boston and Providence's accounts. It is respectfully submitted that the decision of the District Court not to require, under all the circumstances, further advances by the New Haven estate to pay Old Colony and Boston and Providence taxes, did not constitute an abuse of that court's discretion.

The correct approach is that in the decision in *In re Reorganization of Pittsburgh Rys. Co.*, 111 F. (2d) 932, C. C. A. 3, 1940. The first thing the Circuit Court of Appeals for the Third Circuit did there was to determine whether or not the debtor's estate was liable for the taxes due the State from the underlying companies whose properties were being operated under the so-called net earnings rule as parts of the debtor's railway system;[9] and having found that the debtor's estate was not liable for the taxes, the Appellate Court concluded that the debtor's trustees should not pay them from the debtor's estate. However, it is to be noted that in the *Pittsburgh Rys.* case the lease had not been disaffirmed. It ultimately may turn out that operation is for the lessee's own account, which could not be so here.

Sec. 124a does not in terms reach out beyond the particular business the trustee or agent is conducting —in this case the business of Old Colony and Boston and Providence. It subjects *that business* in the hands of the trustee or agent to the burdens of State taxation "the same as if such business were conducted by an individual or a corporation". If the Old Colony Trustees as such and the Boston and Providence Trustees were operating the lines as well as conducting the general business of the Old Colony and Boston and Providence companies—as it is their duty under Sec. 77(c)(6) to do, if practicable—Sec.

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[9] We refer the Court to subdivisions 1(b) and (c) pages 5, *et seq.* of our brief in reply to the brief of respondent opposing our petition for the following propositions: (1) The *Pittsburgh Railways* case is a case decided under Sec. 124a; (2) It is also a case decided under the receivership rule that the receiver of the lessee's property shall operate "for the account of the lessor", which rule was incorporated into Sec. 77(c)(6).

124a would require them to pay the taxes of that system, and no one would suggest the existence of any duty of New Haven Trustees to do so. Furthermore if, in spite of the necessity of looking to the New Haven estate for physical operation, the Old Colony or Boston and Providence Trustees had sufficient funds in their respective estates, they would have to pay the instant taxes therefrom—either directly or, for convenience, through the New Haven Trustees. The purely fortuitous circumstances (i) that petitioners are operating the Old Colony and Boston and Providence lines under Sec. 77(c)(6), due to the fact that the Old Colony and Boston and Providence estates do not have the equipment physically to operate their own property, and (ii) that the Old Colony and Boston and Providence estates do not have sufficient funds for the payment of their own taxes, do not enlarge beyond the requirements of State law the fund out of which the Old Colony and Boston and Providence taxes would ordinarily be payable under that law.[10]

As has been seen above, the State law did not even try to impose a tax burden upon the New Haven except in its former capacity of "lessee" of the terminal. That the Circuit Court of Appeals rested its decision squarely on Sec. 124a, wholly apart from the provisions of Massachusetts law (thus admitting that thereby it might be enlarging the scope of State law) is well illustrated by the statement at the end of its opinion (R., p. 196) that

> "In the view which we have taken of the case, it is not necessary for us to decide whether the

[10] Ultimate payment of the taxes to the State is, of course, assured through the lien accruing upon the property against which the tax is laid (G. L. Mass., Ch. 60, Sec. 37).

provisions of the Massachusetts Act of 1896, imposing direct obligations on the New Haven, 'being lessee' of the Old Colony, continue to bind the New Haven after it had rejected the lease."

D. THE BACKGROUND OF SEC. 124a ALSO SHOWS CLEARLY THAT CONGRESS HAD IN MIND A SITUATION TOTALLY DIFFERENT FROM THE PRESENT ONE AND DID NOT INTEND TO FORCE THE PAYMENT OF THE TAXES OF ONE ESTATE OUT OF THE FUNDS OF ANOTHER.

Fortunately, both the House and Senate Judiciary Committees filed clear, concise reports with respect to why Sec. 124a should be passed. The Senate Report (73d Congress, 2d Session, Report of Committee on the Judiciary, No. 1372) embodies verbatim the House Report, except for an unimportant amendment. Accordingly, it is necessary to consider here only the House Report.

The House Report (73d Congress, 2d Session, Report of the Committee on the Judiciary, Report No. 1138), with the exception of the formal introductory paragraph, is as follows:

> "The purpose of this bill is to subject businesses conducted under receivership in Federal court to State and local taxation the same as if such businesses were being conducted by private individuals or corporations.
>
> The United States District Court for the Western District of Missouri in the case of *Howe v. Atlantic, Pacific & Gulf Oil Co., et al. (State of Missouri, et al., Intervenors)*, (4 Fed. Supp. 162), recently held that a receiver operating a gasoline-and-oil distributing business under appointment by the Federal court was not liable

for a sales tax on motor fuel levied by the State of Missouri. As a consequence of this decision, your committee is advised, the State of Missouri and other States having similar statutes are losing thousands of dollars of revenue per month.

No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue."

The only debate on this bill took place in the House and is to be found at page 6656 of the Congressional Record for the 73d Congress, 2d Session. The debate is only a few paragraphs long and the only material part of it is as follows:

"Mr. McKeown: A great many receivers in oil cases have been held by the court not liable to pay taxes. They do not pay the gasoline taxes to the State. * * * [One sentence paraphrasing above] * * * In the receivers for bank cases (sic) they do not have to pay the taxes to the State."

It is accordingly perfectly clear that both the House and the Senate had in mind the situation raised by the *Howe* case in passing this statute. In the *Howe* case (reversed later—70 F. (2d) 360) the Federal Court in Missouri held that a receiver of a gasoline company was not subject to a sales tax on gasoline, even though the Company itself would have been subject to the tax if it, instead of the receiver, had continued to conduct the business. Congress accordingly enacted Sec. 124a for the purpose, as stated in the above report, of being sure to subject "businesses conducted in a receivership" to local taxation "the same as if such businesses were being conducted by private individuals or corporations".

The purpose of Sec. 124a is "to facilitate—not to obstruct—the enforcement of State laws" (*Boteler* v. *Ingels*, 308 U. S. 57 [1939]); and recent typical cases illustrate its application to *the particular property or business upon which the tax is laid* (*Boteler* v. *Ingels*, *supra*; *Ingels* v. *Boteler*, 100 F. (2d) 915, 919, 920, C. C. A. 9, 1938; *Board of Directors of St. Francis Levee District* v. *Kurn*, 98 F. (2d) 394, 397, C. C. A. 8, 1938, cert. den., 305 U. S. 647 [1938]).

That this was the purpose of Sec. 124a is shown not only by the Congressional Report and debate, but also by many court decisions, of which that of the Circuit Court of Appeals for the Eighth Circuit in *Thompson* v. *Louisiana* contains perhaps the fullest discussion (98 Fed. 108—1938). In that case the Court referred to the holding in *United States* v. *Whitridge*, 231 U. S. 144 [1913], that the federal corporation tax law imposing an excise tax on the doing of business by corporations, was not applicable to a receiver of a corporation appointed in a state court; that the receiver was not liable for corporation taxes subsequent to his appointment, since he operated the property as an officer of the court and not as an officer of the corporation. The Circuit Court of Appeals also referred to the opinion in *Hagerty* v. *Michigan Trust Company*, 286 U. S. 334 [1932], in which Mr. Justice Cardozo, speaking of a Michigan statute imposing a tax upon a corporation for the privilege of exercising its franchise and of transacting business, said:

> "Whether a corporation does exercise its franchise or transacts its business within the meaning of a statute so framed when it does business through a receiver is the subject on which much

subtle argument has been expended by State and Federal courts."

After referring to other cases in which such distinctions had been attempted, and in some recognized, the Circuit Court of Appeals said:

> "As has been observed, before the passage of Sec. 124a, there had been holdings to the effect that a receiver conducting the business of a corporation was not liable for the franchise tax, and there have been holdings that such a receiver should be liable for such a tax. The courts had also held that the trustee in bankruptcy should not be held so liable because he was vested not only with the title but possession of the property, and hence, the corporation was not doing any business. * * *
>
> "There was more or less doubt and uncertainty as to whether, or under what conditions, receivers, liquidators, referees, trustee, or other officers appointed by Federal courts to conduct any business should be liable for local taxes applicable to the business conducted. In this state of affairs, Congress passed Section 124a, for the manifest purpose of putting at rest all doubt and uncertainty in this regard" (p. 111).

The requirement that one estate should pay the taxes assessed against another estate would be a novel principle of taxation. We have now examined the background of the passage of Sec. 124a and have seen that Congress never in any way considered such a principle in passing Sec. 124a. It would be inconceivable that Congress should inaugurate such a principle without even mentioning it or considering it. Therefore, we may conclude that, *since Congress had a purpose other than the one claimed by respondents*

in passing Sec. 124a; since it made no mention whatsoever of this claimed novel purpose in passing this Section; and since the purpose now claimed for it would be a wholly new principle of taxation, this Court would be unwarranted in so construing this Section as to make one trust or receivership estate liable for the taxes of another estate.

(3) Sec. 124, whether considered alone or in conjunction with Sec. 77(c)(6), does not make cash in the New Haven estate available for the discharge of indebtedness of Old Colony and Boston and Providence estates to the Terminal Company for the latter's bond interest, the payment of which is not immediately necessary to continued operation of the lines of the former lessors.

A. Introductory.

So much for the question of the statutory requirement to pay taxes. The question whether the New Haven estate is required to advance cash for the payment of interest on the Boston Terminal Company bonds for which the Old Colony and Boston and Providence corporations were obligated, is a wholly distinct question. As the Circuit Court of Appeals pointed out, the answer to that question must begin with a consideration of Sec. 124. While the section enacted in respect of taxes was designated Sec. 124a, it was, as we have seen above, passed in 1934, forty-seven years after the enactment of Sec. 124. Moreover, as we have seen, Congress did not refer to Sec. 124 in passing 124a. It was probably placed next to Sec. 124 in the United States Code only because both sections deal with federal receivers and trustees.

In addition to the fact that Sec. 124a relates only to taxes, it is important to note the fundamental difference in the provisions of the two sections. Sec. 124 reads in part as follows:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager *in possession* of any property, such receiver or manager *shall manage and operate such property* according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

From the first clause of this section it is clear that —unlike Sec. 124a, which describes only receivers or trustees who "conduct [the] business"—Sec. 124 does describe the New Haven Trustees here, for they do "operate [the Old Colony's and Boston and Providence's] property". This section, it is seen, not only begins by being applicable to those receivers who carry on the physical operation of the property, but the whole section is devoted to *physical operation* of the property—to assure that in such physical operation the requirements of valid State law shall be complied with.

B. THE REQUIREMENT OF SEC. 124 RELATES TO PHYSICAL OPERATION OF THE PROPERTIES OF OLD COLONY AND BOSTON AND PROVIDENCE, NOT TO THE PAYMENT OF INTEREST ON BONDS FOR WHICH THOSE COMPANIES ARE LIABLE.

Sec. 124 differs from Sec. 124a in that it is concerned with the physical operation of property by court officers, not payment of corporate indebtedness.

Accordingly this Court has held that a federal receiver or trustee is bound by valid State laws relating to the operation of trains at a specified speed (*Erb* v. *Morsch*, 177 U. S. 584 [1900]), the abandonment of railroad service (*Palmer* v. *Massachusetts*, 308 U. S. 79 [1939]), and the giving of a bond to observe the requirements of State laws as to operation, including a bond for taxes (*Gillis* v. *California*, 293 U. S. 62 [1934]). Compliance with the State law under these decisions required the receiver or trustee to lay out more in cash than non-compliance would have, but this was because Sec. 124 required him to operate in a certain way. However, this merely shows that occasionally payment has been a by-product of the statute,—not that payment is its goal. After all, the stated statutory obligation is to "manage and operate". And, significantly, when the court officer paid the increased expense of compliance with State law, under the decisions just cited, he was not paying principal or interest on a debt previously incurred by a debtor corporation before the receivership began.

State law, of course, always requires a debtor to pay his debts. If this section, which is directed toward assuring compliance with State laws as to the operation of properties, should be held to have the same meaning as that given by the Circuit Court of Appeals, it would require that every receiver who actually operates a property of an insolvent corporation would have to find and advance cash to pay all the debts of such corporation. The inequity of such a result would be all the more striking here, where the New Haven trustees are being required to operate the properties of Old Colony and Boston and Providence under compulsion of Sec. 77(c)(6), since those companies themselves are physically unable to operate their own property.

The long forbearance of the New Haven estate and its creditors in advancing New Haven funds in connection with the operation (and in some cases even where not necessary to physical operation) of the Old Colony properties is evidenced by the fact that the amount of such advances during the last four years total some $20,000,000. As the Circuit Court of Appeals pointed out, the Old Colony property no longer affords the New Haven estate "a sufficient security to warrant the diversion of additional funds, without jeopardy to the claims of the New Haven's own secured creditors" (R., p. 187).

The New Haven Trustees must, however great the desire to continue physical operation, bear in mind that the assets of the New Haven estate are held for the payment not only of the New Haven creditors but also of the debts which they as New Haven Trustees have incurred. Their debts as New Haven Trustees must be paid before reorganization can be accomplished. But, if, as the court below would have them do, they continue paying debts previously incurred, not even by the New Haven, but by the Old Colony and the Boston and Providence, no fair reorganization would be possible.

Even if the court below was correct in its conclusion that under Sec. 77(*c*)(6) "the burden of operating, come what may, survives rejection" and "even if the *indispensable* costs of operation result in a net loss, that loss must be met, if necessary, out of the funds of the lessee" (R., p. 190, fol. 570), that conclusion has utterly no bearing on the present controversy. As the Court has found, neither the payment of taxes nor of interest is indispensable to operation (R., p. 192, fol. 575). Petitioners are paying currently all expenses necessary to operation into the terminal (R., p. 10, pars. 7, 8; p. 192, fol. 574) and

such operations are in fact continuing despite petitioners' continued compliance with the order of the District Court here in issue. Every stated requirement of Sec. 77(c)(6) is being met. As the District Court pointed out, "operation" is the only mandatory duty the subdivision imposes on a lessee's trustee. Surely it cannot be stretched to include a requirement that the trustee must make payments for the lessor which are not necessary to the operation the subdivision requires.

C. THE INTERPRETATION OF SEC. 124 MADE BY THE COURT BELOW CREATES A PREFERENCE IN FAVOR OF BONDHOLDERS OF THE BOSTON TERMINAL—A WHOLLY SEPARATE ESTATE—OVER THE SECURED CREDITORS OF THE NEW HAVEN WHO HAVE A FIRST LIEN ON THE FUNDS INVOLVED.

The Boston Terminal bondholders have a claim against the Boston Terminal Company secured by the terminal properties. They may have an unsecured claim against the Old Colony and Boston and Providence which has no great value in view of the insolvency of these companies. They have no claim against the New Haven estate at all. In spite of this, the Circuit Court of Appeals' decision has the effect of giving these bondholders a prior claim—worth immediate cash—against the New Haven estate in priority to the secured bondholders of the New Haven.

Bonds issued to pay for the cost of construction of a railroad terminal obtain no prerogative rights or extension of stated security from the mere fact that the State, in the exercise of its police power provided for the terminal to be built and paid for by a bond

issue. The bonds are not thereby insulated from the consequences of bankruptcy or insolvency. They wear no halo, but are mere evidences of indebtedness entitled, to the extent they are unsecured, to share equally in the estate of a bankrupt obligor. Even under the assumption, made solely for purposes of this particular argument, that the New Haven is now liable for the bond interest, no property, real or personal in the New Haven estate is described or identified as security for the payment of the principal of or interest upon the bonds, which are a lien only on property of the Terminal Company (see *North Kansas City Bridge & R. Co.* v. *Leness*, 82 F. (2d) 9, 13; C. C. A. 8, 1936). At most, the New Haven's hypothetical indebtedness for interest would make the Terminal Company a general creditor of the New Haven, holding a common claim against it under Sec. 77(b).[11]

The New Haven's own bondholders, who are secured by mortgage on New Haven property, and the holders of obligations guaranteed by the New Haven are still waiting for payment of interest (R., p. 13, fol. 38) due by the "valid laws" of all the States in which the New Haven lines are operated. It is in bankruptcy. That being the case, unless sufficient property is available therefor, the New Haven's general creditors will get no interest whatsoever on their claims. One of the evident purposes of the Bank-

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[11] "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act", . . . and

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

ruptcy Act is to prevent preference and provide for a fair distribution of the assets of a debtor. This is of course true of the reorganization sections of the Act, even though the property distributed under the plan is usually in the form of securities of a new corporation rather than in property of the debtor. Even if the Massachusetts Act of 1896 had required the New Haven to guarantee for all time the punctual performance of the Terminal Company obligation upon its bonds, the guarantee would now be no more enforceable specifically than other general claims against the New Haven. To pay the interest after the bankruptcy proceedings began would be to prefer Terminal Company bondholders over both secured and common creditors of the New Haven and interfere directly "with the [exercise of] federal equity and bankruptcy powers upon which the reorganization of railroads is based". (Cf. Opinion below, R., p. 195, fol. 584).

Sec. 124 announces no purpose to interfere with the fair distribution of insolvent estates; and there is no reason for implying one. The statute deemed controlling by the lower court simply has no bearing on the matter of present payment of general or secured claims in bankruptcy though payment be admittedly due under valid State laws. The discharge of a debtor's obligations is left to the Bankruptcy Act itself, and it forbids preferences.

Sec. 77(c)(6) adds nothing to Sec. 124 in this connection. By no stretch of the imagination could the payment of a general claim for bond interest be deemed necessary to continued operation of the property of the former lessors. The court below did not so find. Indeed it found that such payment was not necessary, but none the less ordered it. We submit that neither Sec. 124, nor Sec. 77(c)(6), nor both

together were intended to bring about the result sanctioned by the Circuit Court of Appeals.

(4) *The interpretation made by the court below of Secs. 124 and 124a taken in connection with Sec. 77(c)(6) violates the due process clause of the Fifth Amendment to the Constitution of the United States.*

It should be understood at the outset that our only claim here is that the statutes are unconstitutional *as construed and applied by the Circuit Court of Appeals*,—not that they are unconstitutional in and of themselves. Accordingly, the following argument is useful primarily because it shows that the statutes cannot mean what the court below said they mean, for if they do collision with the due process clause would be immediate and fatal.

Taking the record as we find it, there is no need here to consider whether or not the Fifth Amendment would be violated by Congressional legislation requiring the New Haven estate to pay such *necessary* expenses of operation of Old Colony and Boston and Providence estates as *could ultimately be recovered* out of their properties. Although such a question would merit the attention of this Court, the present record presents a question even more serious. In this case the court below so construed and applied Secs. 124a and 124 in conjunction with Sec. 77(c)(6), as to require the New Haven estate to pay even the expenses of Old Colony and Boston and Providence that are *not necessary* to their continued operation and *cannot be recovered* from the operated properties.

In making provision for continued operation through Sec. 77(c)(6) Congress exercised powers granted to it by the Constitution to regulate com-

merce among the several States (Article I, Section 8, Clause 3) and to establish uniform laws on the subject of bankruptcies (Article I, Section 8, Clause 4). *Warren* v. *Palmer, supra* (310 U. S. 132); see also *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 671, 672 (1935). But these powers, like other great substantive powers of Congress, are subject in their exercise to the Fifth Amendment which forbids Congress to deprive any person of life, liberty or property without due process of law or to take private property for public use without just compensation (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 589 (1935); *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336 (1893); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451 (1937); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 347 (1935); *Chicago, Rock Island & Pacific R. Co.* v. *United States*, 284 U. S. 80, 96, 97 (1931)).

Decisions of this Court have placed beyond question the test it will apply in determining the validity of legislation in this connection. The requirement is:

> "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

Nebbia v. *New York*, 291 U. S. 502, 525 (1934);
Railroad Retirement Board v. *Alton R. Co.*, *supra*, 295 U. S. 330, 348, Note 5;
Heiner v. *Donnan*, 285 U. S. 312, 326 (1932);
Chicago, Rock Island & Pacific R. Co. v. *United States*, *supra*, 284 U. S. 80, 96, 97;

Great Northern R. Co. v. *Washington*, 300 U. S. 154, 160 (1937);
Nashville, C. & St. L. Ry. v. *Walters*, 294 U. S. 405, 429 (1935);
Chicago, M., St. P. & O. R. Co. v. *Holmberg*, 282 U. S. 162, 167 (1930);
Liggett Co. v. *Baldridge*, 278 U. S. 105 (1928).[12]

In the present case "the object sought to be attained" by Sec. 124 and by Sec. 77(c)(6) is continued operation of Old Colony and Boston and Providence properties into the terminal during reorganization proceedings, and the "object sought to be attained" by Sec. 124a is to subject to taxes *the business conducted for and the property of those companies* during such proceedings. The "means selected" by the legislation, as construed by the court below, were the payment of current Terminal Company taxes and bond interest out of another estate, although such payment was found not to be immediately necessary to continued operation. There is no relation, "real and substantial" or otherwise, between continuance of operation and the payment of charges not necessary to that operation; and if there were such a relation there is no reason in fairness why the New Haven estate should be called upon to discharge the debts of others by advancing cash that cannot be recovered.

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[12] The same test is applied to the several states under the Fourteenth Amendment (*Nebbia* v. *New York*, *supra*, 291 U. S. 502, 525; *Heiner* v. *Donnan*, *supra*, 285 U. S. 312, 326). Since this Court cites cases interchangeably under both amendments (*Railroad Retirement Board* v. *Alton R. Co.*, *supra*; *Heiner* v. *Donnan*, *supra*) we do likewise herein.

It may once have been true in a sense that the New Haven and the Old Colony system were members of the same family,[13] but it is not due process for the legislature to add the property of a wife to that of her husband in computing the husband's tax assessment even if they reside together as members of a family (*Hoeper* v. *Tax Commission*, 284 U. S. 206, 215 [1931]). So here. And *a fortiori* it is not due process to expropriate property in the bankrupt New Haven estate for the payment of taxes and bond interest of the Terminal Company for which the Old Colony and Boston and Providence are liable, however desirable it may be, as a general proposition to assure their payment. (*In re Reorganization of Pittsburgh Ry. Co., supra*, 111 F. (2d) 932, 935).[14]

The Massachusetts Act of 1896 did not even try to make the taxes or bond interest operating expenses of the New Haven estate (and payable now as an expense of administration of that estate) after the lease has ended.[15] Moreover, it could not have done

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[13] The lease that bound them together has now been rejected.

[14] In that case the Circuit Court of Appeals for the Third Circuit pointed out that until proof of net earnings by each underlier was made, any order directing the reorganization trustees of the Debtor to pay the underliers' taxes "would have no factual basis and would, therefore be *arbitrary* and possibly *confiscatory*". In the present case there is not even a possibility of net earnings by the underliers. Instead, the record shows a *deficit* of more than $20,000,000 (R., p. 13, fol. 37; p. 37, fol. 109; and see R., pp. 97-107, 114-122, 144-153).

[15] Section 10 of the Act merely provided that the payment should be deemed a part of *said railroad companies'* operating expenses and the New Haven no longer comes within that language (see subdivision 1 hereof, *supra*).

so if it had tried, for to adapt this Court's language in the *Hoeper* case, *supra* (p. 215) to the present situation, that which is not in fact an operating expense of the New Haven estate cannot be made such by calling it an operating expense (see also *Heiner v. Donnan*, *supra*, 285 U. S. 312). Indeed the taxes and bond interest here are no more operating expenses of the New Haven estate than the income of the wife in the *Hoeper* case was income of the husband, no matter what the legislature may have called them. The New Haven corporation is not made liable by State law for the payment of these charges, and if it were, a general claim for terminal bond interest would be no more an operating expense of petitioners than any other general claim against the New Haven.

And even if the New Haven Company were liable for the bond interest, the direction of the court below that petitioners pay it in full from assets belonging to New Haven creditors could be justified under the Fifth Amendment only if the liability were fully secured by property in the New Haven estate (*Doty v. Love*, 295 U. S. 64, 74 [1935]). As a matter of fact the bonds are a lien only on Terminal Company property and there is no property whatsoever in the New Haven estate upon which they are legally or equitably a charge.

The court below sought to justify the result of its decision by stating that petitioners could relieve themselves of the charges for the taxes and bond interest by seeking and obtaining permission from appropriate authorities to abandon all or a part of the operation into the terminal (R., p. 191, fols. 572, 573). This suggestion can perhaps be disposed of merely by pointing out that it boils down to a holding that

corporate debts petitioners do not owe must nevertheless be paid by them so long as they are required by Sec. 77(c)(6) to operate property of the bankrupt corporations that do owe them. But the issue here is not whether there shall be payment or abandonment. Instead it is: Must petitioners advance cash out of the New Haven estate for the payment of charges not necessary to operation?

Indeed it is difficult to believe that any appropriate federal or State authority would find that public convenience and necessity permitted abandonment of the terminal merely because charges for interest on its bonds are out of proportion to the business transacted. To do so would be to burn the ship merely to get rid of the rats. The obvious remedy here is reorganization of the Terminal Company, not abandonment of its property. This process, as noted, has already been initiated.[16] And where a middle course (reorganization) is feasible, neither the constitutionality of statutes nor departure from their plain meaning can be justified by suggesting an impracticable alternative. Yet the court below did just this. And in so doing it at least gave rise to a possibility that payment of the charges would place the Terminal Company in a position to obtain a dismissal of its reorganization proceedings whether or not it is in fact overcapitalized.

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[16] A plan was filed for the Terminal Company with the Interstate Commerce Commission by the Old Colony Trustees on May 3, 1940 but its consideration has been held up pending the outcome of this case. *In the Matter of The Boston Terminal Company, Debtor*, I. C. C. Finance Docket No. 12625.

(5) *The public interest is not involved here since continued operation of the property is not threatened and since the Commonwealth is not deprived of its right to payment of the taxes.*

The Circuit Court of Appeals relied heavily upon *Palmer* v. *Massachusetts, supra,* 308 U. S. 79, in the course of its abandonment argument but that decision does not touch the present problem. It merely holds that a reorganization court may not authorize abandonment of operation (as distinguished from non-payment of debts) when the Interstate Commerce Commission and the State authority have not acted within their respective fields. Here there has been no abandonment of operation. As the courts below found, the continued operation of the properties of the Old Colony, the Boston and Providence and the Boston Terminal Company in the public interest is in no way threatened either by the tax or interest disputes. The Circuit Court of Appeals confused with this public interest the present issue which is one solely between conflicting private interests, the security holders of the Terminal Company on the one hand and those of the New Haven estate on the other. By entering its order here in question the District Court did not deprive the Commonwealth of Massachusetts of any right. The Commonwealth in addition to having a lien on the property still has all its right against those who owe the taxes, the Boston Terminal Company, the Old Colony and the Boston and Providence. The court's order merely refused to require the New Haven Trustees to make further advances to those parties for taxes not owed by the New Haven estate and which would have to be taken out of funds held solely for the benefit of New Haven

security holders; the order in no way changed the legal situation.

In the *Interborough* case referred to above, Judge Mack in refusing to require the Interborough estate to provide funds for the payment of Manhattan taxes showed that the priority of the tax lien on Manhattan property was conceded but that "priority in *ad interim* payment does not, however, follow therefrom". He continued (Vol. VII, Interborough Rapid Transit Co.-Manhattan Railway Co. Printed Receivership Record, p. 6237):

> "Ultimate payment of the taxes with interest and penalties is assured because the value of the property of the corporation vastly exceeds the amount of the tax claim."

The tax issue here comes down in substance to a question between the security holders of the New Haven on the one hand and the security holders of the Boston Terminal Company, Old Colony and Boston and Providence on the other. One representative of the latter group of security holders (the trustee of the mortgage securing the bonds of the Terminal Company being the sole appellant below) is seeking to force the former group to pay the tax burdens of the latter.

Similarly the question of bond interest payments is a private matter only, not involving the public interest. The Boston Terminal Company bondholders cannot prevent the physical operation of the Terminal Company property; they are relegated to the remedies in the Bankruptcy Act as is every other railroad bondholder. Like any other railroad bondholder they are entitled only to their fair share in the assets of

the estate against which they have a claim. They are not entitled to require payment out of the assets of another estate also undergoing reorganization prior to the secured creditors of that estate.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and that Order No. 398 of the District Court should be affirmed.

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APPENDIX.

Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. A., Sec. 124a):

"Sec. 124a. STATE TAXATION; BUSINESS CONDUCTED BY RECEIVERS, TRUSTEES OR OTHER COURT OFFICERS SUBJECT TO

Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

Section 65 of the Judicial Code (28 U. S. C. A., Sec. 124):

"Sec. 124. (Judicial Code, section 65.) MANAGEMENT OF PROPERTY BY RECEIVERS. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situ-

ated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year or both."

Section 77(c)(6) of the Bankruptcy Act (11 U. S. C. A., Sec. 205(c)(6)):

"(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49."

Massachusetts Acts and Resolves, 1896, Ch. 516:

"Sec. 2 [as amended by Acts 1921, Ch. 363]. The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, its lessee, the New York Central Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for or purchase and hold one fifth

portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act."

"Sec. 9. All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land herein-above authorized to be taken, for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce this provision; but said terminal company may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station hereinafter provided for, as may be reasonably necessary for their respective use."

"Sec. 10. Said railroad companies hereby required to use said union station shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent, per annum upon its capital stock. Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has

the use thereof, the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree, the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all of the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies, and the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process."

"Sec. 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 120.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

REPLY BRIEF FOR PETITIONERS.

HERMON J. WELLS,
Attorney for Petitioners.

J. H. GARDNER, JR.,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Petitioners,

—against—

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

REPLY BRIEF FOR PETITIONERS.

(1) *Respondent's brief fails to answer our argument that Section 124a and Section 124 do not require petitioners to pay Terminal Company taxes and bond interest out of the New Haven estate.*

Only nine pages of respondent's 65-page brief (pp. 49-58) are devoted to the principal issues in the present appeal—*viz.*, the meaning of Sections 124a and 124 with relation to property in the New Haven estate (compare Petitioners' Brief, subdivisions 2 and 3, pp. 17-40). Respondent tacitly admits the weakness of the decision of the Circuit Court of Appeals by directing most of its brief to arguing matters deemed by that Court to be unnecessary to decide.

A. Respondent's argument as to Section 124a.

Respondent's argument as to Section 124a may be summarized thus:

> Petitioners are trustees or agents appointed by a United States court. They are authorized to conduct, and they are conducting the business of Old Colony and Boston and Providence as agents of the court under Section 77(c)(6). The taxes are State and local taxes applicable to the business of Old Colony and Boston and Providence. Therefore petitioners must pay the taxes.

Even if this argument were sound* it would merely prove that petitioners are described by the statute and obligated to pay the taxes, and would fall far short of sustaining the proposition respondent must sustain in order to procure affirmance of the judgment below—namely that the statute requires petitioners to pay the taxes *out of New Haven funds*. We have shown that the statute lays down no such requirement (Petitioners' Brief, subdivisions 2C and D, pp. 22-33), and respondent has not even attempted to answer our argument save by a mere assertion (Respondent's Brief, p. 51) that if necessary petitioners must go to New Haven funds for payment.

Respondent's approach to the problem is substantially that of the Circuit Court of Appeals (Respondent's Brief, p. 50). That court, without hearing argument on the point and believing that petitioners were described by Section 124a and that they were obligated by that section to pay the taxes, jumped immediately to the conclusion that payment should be made out of New Haven funds. Petitioners are certainly not, as respondent alleges,

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* Compare petitioners' brief, subdivision 2B, pages 17-22.

"policy determiners of the Old Colony and Boston & Providence" (Respondent's Brief, p. 58). Thus it was the Old Colony Trustees who filed the Old Colony's Boston Group Abandonment Petition (Cf. I. C. C. Finance Docket No. 12614 referred to at p. 20 of Our Main Brief), in which the New Haven Trustees joined only as operators of the Old Colony's lines. But what we wish particularly to emphasize here is that even if respondent and the Circuit Court of Appeals are right in their premise that the statute gives rise to a liability of petitioners as operators of the Old Colony and Boston and Providence lines, it by no means follows that the liability should be discharged from New Haven funds.

On behalf of the New Haven estate, petitioners rejected the Old Colony lease, carrying with it both the Old Colony and Boston and Providence properties. This rejection meant that they considered the lease a burden, and not a benefit, to the New Haven estate and that they refused to adopt that burden. But under Section 77(c)(6) they were compelled to continue operation of Old Colony and Boston and Providence properties. They had no option as to this. They could not have refused and thus do not come within the rule stated by Judge Learned Hand in *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. (2nd) 574, 576 (C. C. A. 2nd, 1930), that receivers should refuse to accept property they think burdensome. This rule, recognized also in *Hennepin County, Minn.* v. *M. W. Savage Factories, Inc.*, 83 F. (2nd) 453, 455 (C. C. A. 8th, 1936), has no application to the present case. Petitioners' operation is for the account of the former lessors and not for the benefit of the New Haven estate.

B. *Respondent's argument as to Section 124.*

Here, also, respondent fails to meet the issue before this Court as to the meaning of Section 124, but contents

itself with insisting merely that petitioners are described by the statute and are using the terminal. Respondent has failed to point out why payment should be made from New Haven funds.

Respondent also fails to advance any convincing reasons why a statute, such as Section 124, dealing with "operation" should be tortured into a direction to pay debts not necessary to operation. And the penalty provided for violation of the Section* is inappropriate to a statute dealing with payment of money. Instead of fine and imprisonment we should expect to find a penalty in the nature of interest, as with tax statutes, if respondent were right. Surely the inclusion of such penalties indicates that the statute was not intended to apply to such payments.

Under Section 77(c)(6) the use of the terminal by petitioners over the lines of Old Colony and Boston and Providence is a use "for the account of the former lessors". It is not a New Haven use. Accordingly, there is no reason why the New Haven estate should pay for this use (compare Respondent's Brief, pp. 56-57), and the fact that "the items involved in the present case represent current charges" (Respondent's Brief, p. 57) does not aid respondent at all. The current charges are current charges of Old Colony and Boston and Providence and should be paid from the properties of those companies. See also petitioners' brief, pages 37-39. The order appealed from (Order No. 398, R., p. 20) did not authorize use of the terminal without compensation or decide that certain items (viz., taxes and bond interest) prescribed by the Massachusetts statute should not be paid from Old Colony and Boston and Providence estates (compare Respondent's

* "Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3000, or imprisoned not more than one year, or both" (Sec. 124, quoted p. 50 of Petitioners' Brief).

Brief, pp. 38, 39, 47, 48, 63). It was entered after a finding that the Massachusetts Act of 1896 no longer applied to the New Haven, and it merely directed that the taxes and bond interest should not be paid *from New Haven funds*, thereby leaving the obligation with Old Colony and Boston and Providence estates. The present case raises no question whether use by Old Colony and Boston and Providence should continue without payment by them.

(2) *Respondent's brief fails to answer our argument that the Act of 1896 does not apply to the New Haven after the Old Colony lease had ended and use of the terminal on behalf of the New Haven had ceased.*

Respondent devotes the bulk of its brief (subdivisions (A) to (F) inclusive, pp. 10-48) to an attempt to show that the Act of 1896 still applies to the New Haven after the Old Colony lease had ended (as respondent admits it had—Brief, p. 41) and after the New Haven's use of the terminal ceased. The whole argument in the earlier portion of the brief (with the possible exception of subdivision (F)(2), pp. 45-48) is founded principally on an assumption that the New Haven trustees are using the terminal in their operation of the New Haven property, for only thus can respondent make out a New Haven use upon which a New Haven liability would necessarily depend (Section 10 of the Act of 1896).

Under Section 77(c)(6) the primary obligation to operate after rejection is placed specifically on the "lessor", and a secondary obligation arises in the "lessee" only in the event that "it would be impracticable and contrary to the public interest for the lessor to operate", in which event the lessee continues operation *"on or for the account of the lessor"*. It follows from the very section upon which respondent so heavily relies (Brief, subdivi-

sion (E), pp. 43 *et seq.*) that petitioners' operations into the terminal are not operations for the New Haven, but for the Old Colony and Boston and Providence estates.

The crux of respondent's argument appears on pages 29 to 31 of its brief, where it makes the most extreme statements contrary to the facts of record in this case and contrary to express provisions of Section 77(c)(6). It says (Brief, p. 29) that "the New Haven trustees continued to operate the business of the New Haven Railroad Company and continued to use the terminal facilities in the same way as they were used prior to the bankruptcy". This is just not so and therefore it will not support the conclusion that "the trustees of the New Haven were bound directly under the Massachusetts Act of 1896". Before bankruptcy the New Haven operated the lines of Old Colony and Boston and Providence for its own account. After rejection of the leases, when the Old Colony and Boston and Providence found themselves unable to operate, the petitioners were compelled to do so—but for the account of the former lessors.* Also, on the same page of its brief, respondent states that the revenues from terminal operations benefited the New Haven estate. This is not true. Use of the terminal for the period here involved was due solely to the operation of Old Colony and Boston and Providence lines. This latter operation has required advances by the New Haven estate in excess of $20,000,000 for the period from October 23, 1935, to and including December 31, 1939,—a loss to which terminal operations have contributed handsomely (see Petitioners' Brief, p. 5, for record citations). Thus respondent is driven to a claim that operating deficits are beneficial to the New Haven estate.

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* This is clearly alleged in the verified petition upon which the order here in issue was made (R., pp. 4-11), the respondent having expressed itself as quite content to stand on the petition (R., p. 31).

Respondent's statements on pages 29 to 31 of its brief ignore what has occurred during the reorganization proceedings, including decisions of the Circuit Court of Appeals (*Palmer* v. *Palmer*, 104 F. (2d) 161, C. C. A. 2d 1939, cert. den. 308 U. S. 590 [1939]), and this Court (*Warren* v. *Palmer*, 310 U. S. 132 [1940]). If the Old Colony and Boston and Providence leases had terminated by lapse of time, no one could deny that the Old Colony and Boston and Providence estates would be liable for terminal charges and not the New Haven estate. Yet respondent ignores the termination of those leases through bankruptcy proceedings, the absence of a New Haven use of the terminal, the accounting proceedings of Old Colony and Boston and Providence in accordance with the above cited decisions and the express provision of Section 77(c)(6) that operations are for the account of the former lessors. Respondent is forced (p. 31) to the admission that "legal relationships between the New Haven, the Old Colony and Boston and Providence may have changed". Indeed they have; but respondent finds it necessary to ignore these changes in order to sustain its argument that matters stand now just as they stood before reorganization proceedings started.

The present case would stand differently if the Boston and Providence and Old Colony had merged into the New Haven, for in that event use of the terminal over Old Colony and Boston and Providence lines would be a New Haven use. Respondent even goes so far as to claim there has been such a merger (Respondent's Brief, p. 23), but this claim cannot be taken seriously. Indeed, the fact that respondent has built its argument on such a claim is in itself a good indication that the argument is without any real foundation.

Respondent also attempts to show a present New Haven use of the terminal from the fact that in 1931 the De-

partment of Public Utilities of Massachusetts determined under Section 10 of the Act of 1896 that the proportion of use was 70% by the New Haven and 30% by the New York Central. The suggestion is (see Respondent's Brief, pp. 2, 4, 5, 8, 9, 18, 19, 26, 27, 28, 29, 30, 32, 35, 38, 43, 44) that even if no New Haven use of the terminal is made in fact this Court must shut its eyes to that fact because of the Department's determination. Such an argument presents a twofold difficulty. In the first place the New Haven is no longer one of "said railroad companies" within the Act of 1896. In the second place Section 10 of that Act requires said railroad companies to pay the Terminal Company only "for such use" as they make of the terminal. If there is no use there can be no payment; and if there is no use the Department of Public Utilities is given no authority by the Act to determine that there is a use. When it made its determination in 1931 there was an admitted use by the New Haven, which was then lessee of the Old Colony and Boston and Providence properties.

The correct explanation for the requirement of Section 10 that the Department shall determine the terminal use proportion is to be found in respondent's brief, page 27, where it is stated that the "proportion of use was bound to vary at different times and could not have been determined once and for all by the Act". So viewed, Section 10 provides a sensible scheme for administrative determination of a variable at designated intervals, not for the perpetuation of a liability for any period of time during which there is *no use* of the terminal by one of "said railroad companies". In fact, as we have suggested in our brief (pp. 14-15), the order of the Department upon which respondent so heavily relies (Respondent's Brief, pp. 2, 4, 5, 8, 9, 18, 19, 26, 27, 28, 29, 30, 32, 35, 38, 43, 44) did not even purport to fix a liability upon the New Haven; it

merely fixed a proportion of use as between the two lessee companies then using the terminal and quite promptly left the matter of liability to Section 10 of the Act. The earlier use by the New Haven in its own behalf has simply changed to a use by petitioners, under compulsion of Section 77(c)(6), in behalf of the former lessors who are named in the statute and liable for that use. The order appealed from was not "contrary to the Massachusetts statute and the lawful order of the Massachusetts Department of Public Utilities" (Respondent's Brief, p. 2). Respondent has misstated the issue.

The duty of Old Colony and Boston and Providence estates to discharge their liability to the Terminal Company for the use their lines make of its property was characterized by the Circuit Court of Appeals as a "duty" "no one could gainsay" (R., p. 193, fol. 579). This is evident from the fact that the former lessors are among "said railroad companies" named in Section 2 of the Act of 1896 and liable for use under Section 10. Nevertheless respondent now for the first time claims that they are not liable (Brief, p. 30 note, p. 43), and proceeds to claim petitioners are liable on the ground that someone must be. Such an approach to the problem commences by flying in the face of the State statute and then proceeds to avoid any consideration of the issue presented on the meaning of the State law.*

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* At pages 19-20 of its brief, respondent makes much of the New Haven trustees' brief filed in the Supreme Court of Massachusetts in opposition to an attempt of the Boston and Providence trustees to attack collaterally in Massachusetts, through Section 10 of the Act, Boston and Providence's share of Terminal expenses as already allocated to it by the segregation formula. Respondent offered the brief in evidence at the hearing below on the theory that it was an admission against interest (R., p. 41, fol. 121). But even if the trustees had made an erroneous statement of the law in a brief filed in other proceedings, that statement could not change the law. The most it

[Footnote continued on following page.]

Respondent also claims that "the Act [of 1896] intended the New Haven to be bound so long as its corporate existence continued" (Brief, p. 14). This is indeed a surprising conclusion to reach from legislation that described the New Haven as "lessee" and imposed a liability only during use. But it is perhaps necessary at this point merely to refer to subdivision (1), pages 11 *et seq.* of petitioners' brief for an answer to respondent's argument that a perpetual liability was intended by the Act as drawn. Stock ownership so much emphasized by respondent will certainly not serve as a peg on which to hang such a liability where use in behalf of the New Haven has ceased and the Old Colony lease to the New Haven has ended (see Respondent's Brief, pp. 11-14). Indeed, if respondent

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could do would be to show that the trustees were mistaken. And as a matter of fact, the trustees' brief shows no inconsistency with their present claims. It does not state that either they or the New Haven were then liable to the Terminal Company under the Act, but merely points out (1) that they were operating for the account of Old Colony and Boston and Providence under orders of the Connecticut District Court with the approval of the Massachusetts District Court having charge of the Boston and Providence reorganization proceedings, (2) that they and not the Boston and Providence trustees were using the Terminal for the account of Boston and Providence, (3) that the Boston and Providence trustees were paying nothing, and (4) that the Boston and Providence trustees were attempting to make collateral attack upon the segregation formula. The District Court found in the trustees' attitude "no indication that the New Haven estate in their hands is liable for payments for which after the rejection of the Old Colony and Boston and Providence leases the lessor estates became solely liable" (R., p. 16, fol. 46).

It should be noted that we do not claim, as respondent suggests in its brief, pages 32, 33, that the segregation formula is "binding" on the Terminal Company. The significance of the formula in this case is twofold: (1) it shows an enormous deficit in the operation of property of the former lessors, thereby demonstrating the risk to New Haven creditors of further advances of cash for Terminal Company taxes and bond interest, and (2) it divides the 70% of charges for use of the Terminal between the estates for whose account the Terminal is used.

is right, the New Haven, despite surrender of the Old Colony, Boston and Providence lines and discontinuance of the use of any line into the terminal, might still be liable under the Act of 1896 because it owned an insignificant stock interest in the Terminal Company. This theory is flatly inconsistent with respondent's main argument (Brief, pp. 2, 10, 22, 25, 26, 27, 39, 40, 43, 45, 47-49, 56-58, 63) that liability under the Act of 1896 is dependent on use. Nor do we attach any significance in this connection to the failure of the General Court to increase over its original amount the capital stock of the Terminal Company in 1921 when The New York Central Railroad Company was named as lessee of the Boston and Albany (Respondent's Brief, p. 15). The New Haven was operating into the terminal as lessee when the Terminal Company was organized and its capitalization determined. No real reason is seen why the capital structure of the Terminal Company should have been changed merely because the Albany let its road to the Central.

(3) Respondent's brief fails to answer our argument that the interpretation made by the court below of Sections 124 and 124a taken in connection with Section 77(c)(6) violates the due process clause of the Fifth Amendment to the Constitution of the United States.

In spite of the finding of both the District Court and the Circuit Court of Appeals that payment of taxes and bond interest here in issue is not necessary to continued operation of Old Colony and Boston and Providence lines into the terminal—a finding amply supported by the record and by the fact that such operation has continued despite compliance with the order appealed from—respondent persists in asking payment of

the taxes and bond interest on the ground that operation into the terminal must continue under Section 77(c)(6) (Respondent's Brief, pp. 58 *et seq.*). Only by treating payment of these charges as necessary to operation can respondent even claim that their payment now out of the New Haven estate may be required because of the public interest in continued operation.* But the present case bears no resemblance to *Palmer* v. *Massachusetts*, 308 U. S. 79 [1939]. There expenses of operation of the 88 stations had to be paid if operation were to continue. Here all necessary expenses of operation are being paid, and operation is being continued.

Moreover, the order appealed from did not deprive the public authorities of any taxes nor restrict the fund out of which those taxes would be payable under State law (see Petitioners' Brief, subd. (4), pp. 11-16). Those authorities still have their liens on the property and their rights against those who owe the taxes, that is, the Boston Terminal Company, the Old Colony and the Boston and Providence. As the District Court said (R., p. 19):

> "Nothing in the order, of course, will preclude the Old Colony trustees of the Boston and Providence trustees from paying the taxes on their respective properties if they can find the necessary funds. It is abundantly plain from the reports in these proceedings that the capital of the Old Colony estate has been so drained that its estate in its present condition

* Respondent's brief fairly bristles with the "public interest", but what the brief asks is really payment of bond interest. We have shown (Petitioners' Brief, pp. 46 *et seq.*) that the public interest is not involved in the present case, and respondent admits (Brief, p. 51) that "the paramount purpose of Section 77(c)(6) is, in the interest of the public, to prevent a discontinuance of service."

is utterly without ability to command sufficient new capital to make the payments for which it is liable. Whether the Boston and Providence trustees could obtain a loan sufficient to pay its taxes is not a question for this court."

Indeed, the taxing authorities have never asked for the lifting of any injunctions against tax collection from Old Colony or Boston and Providence estates, nor have they sought to collect from the Terminal Company.

We do not dispute as respondent suggests at page 61 of its brief the constitutionality of the provision for a continuance of operation in the public interest (Sec. 77(c)(6)), or the fact that the privilege of rejection is conditioned, as it always has been in equity cases,* upon a continuance of operation in the public interest. However, we do dispute respondent's claim that rejection is conditioned upon the payment of expenses *not necessary to a continuance of operation*. There is no such condition in the Bankruptcy Act. Our grievance is that the Circuit Court of Appeals "interpreted" one into the Act through Section 124a and Section 124; and in so doing, we think, violated the Fifth Amendment.

It is true that "The Legislative mandate requiring the lessee temporarily, and in the interest of the public, to fulfill its * * * obligation to operate the lessor lines in accordance with law raises no question of reasonableness or unreasonableness" (Respondent's Brief, p. 61). However, such a question *is* raised when that mandate is seized upon as justification for a requirement that cash in the New Haven estate must be used to pay charges of a lessor's estate that are not necessary to continued opera-

* See subdivision (1)(c), pages 5 *et seq.*, of "Brief of Petitioners in Reply to Brief of Respondent" heretofore filed in these proceedings.

tion. Respondent's brief sidesteps this question by the simple process of assuming that it does not exist, and thus it fails to answer our argument that the exaction in the present case is arbitrary, unreasonable and capricious and without substantial relation to the object sought to be attained by Congress.

At page 63 of its brief respondent argues that the approval and consummation of a plan of reorganization of the New Haven would remove from the reorganized company the burden of Terminal Company taxes and bond interest which respondent says are properly imposed on the New Haven estate by Sections 77(c)(6), 124a and 124 before such approval and consummation. However, even if we accept the premise as to the results of a New Haven plan there is no support for the conclusion that the three Federal statutes should be construed as requiring the continuation of a burden that the respondent assumes the plan should remove. It may well be asked why there should be delay in removing the burden and with it the interim preference to Terminal Company bondholders which is not justified by any discernible public interest.

Respondent objects to our statement in this connection that the solution of the Terminal Company problem lies in its reorganization, characterizing it as "a rather obvious red herring" drawn "across the trail" (Respondent's Brief, p. 63). But the red herring is that of respondent in identifying payment to Terminal Company bondholders with the public interest in continued operation. Apparently our argument on this score has been misunderstood. What we wished to emphasize in our brief, and now emphasize here, is that nothing in Section 77(c)(6), Section 124a or Section 124 requires New Haven creditors to support Terminal Company bonds in order to delay a necessary reorganization of the Terminal Company or for any other reason. That company is clearly in

need of reorganization,* and surely the reorganization sections of the Bankruptcy Act should assist the process, not interfere with it as respondent suggests. And, in any event, the order complained of simply directed the New Haven trustees not to advance New Haven funds to pay respondent's bondholders.

Throughout respondent's argument under the due process clause it also assumes that the New Haven corporation and petitioners are now liable for the taxes and bond interest by reason of the provisions of the Massachusetts Act of 1896. We have shown in subdivision (1) of our brief (pp. 11-16) that this is not the

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* In the Report, cited on page 4 of the respondent's brief, of the Special Commission to Investigate Railroad Transportation Facilities within the Commonwealth, created under Chapter 64 of the Massachusetts Resolves of 1939, the statement is made (p. 26) that "In 1920 the New Haven system carried in and out of Boston 33,896,680 passengers, but in 1938 only 13,406,223, and in 1939 only 12,529,685. It is estimated that for 1940 this number will decrease to about 11,500,000. The Old Colony Railroad [*i. e.*, Old Colony rails] carried in and out of Boston 13,582,806 passengers in 1920 (via Atlantic, excluding Neponset and Mattapan branches), but this number had decreased to 7,500,072 in 1938, and 7,026,752 in 1939. It is estimated that in 1940 this number will shrink to about 6,000,000." A table on that page and on the following page of the report shows a practically continuous decrease in passenger travel in and out of Boston on the New Haven System since 1920. On page 117 the report discusses "possible methods of reducing the charges allotted to the railroads using the South Station." It suggests (1) A five rod tax exemption (pp. 117-118) for each of the railroads whose lines enter South Station, and (2) a decrease in interest rates on Terminal Company bonds and a reduction of taxes on Terminal Company real estate (pp. 118-120). It concludes as follows (p. 120): "As this report indicates, the crux in the solution of the Boston Group problem, and the inclusion of the Old Colony as a part of the reorganized New Haven, lies in a solution of the difficulties of the Boston Terminal Company. The cooperation of all groups and interest [*sic*] is necessary to solve this problem. All parties should endeavor not to bring into existence great difficulties in a transportation problem which is already complex."

case. Moreover, the Circuit Court of Appeals required payment of the taxes and bond interest from cash in the New Haven estate whether or not the New Haven corporation or that estate were liable for them by State law saying that

> "In the view which we have taken of the case, it is not necessary for us to decide whether the provisions of the Massachusetts Act of 1896"

continue to bind the New Haven estate after rejection of the lease. It held that the New Haven Trustees must pay "in any event".

Conclusion.

We urge that the various Federal statutes in issue here do not mean what the Circuit Court of Appeals said they mean. Furthermore, we urge that if they do mean what the Circuit Court of Appeals said they mean they are unconstitutional. Respondent's brief fails to meet and answer our arguments.

Respectfully submitted,

HERMON J. WELLS,
Attorney for Petitioners.

J. H. GARDNER, JR.,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 120

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

BRIEF OF THE RESPONDENT, WEBSTER AND ATLAS NATIONAL BANK OF BOSTON

ROBERT H. DAVISON,
Attorney for the Respondent.

L. H. LANE COMPANY, Law Printers, 221 High Street, Boston.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE,

Respondent.

BRIEF OF THE RESPONDENT, WEBSTER AND ATLAS NATIONAL BANK OF BOSTON.

OPINIONS BELOW.

The opinions of the courts below have not yet been officially reported. They are set out on pages 12 to 19 inclusive and 185 to 196 inclusive, of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 16, 1940. The petition for certiorari was filed June 1, 1940. The jurisdiction of this Court is sought to be invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 12, 1925 (28 U.S.C.A., Sec. 347).

QUESTIONS PRESENTED.

1. Whether or not the trustees of the property of a railroad operating the property of lessor railroads under Section 77 (c) (6) of the Bankruptcy Act (11 U.S.C.A., Sec. 205 (c) (6)) for the account of the lessor roads after rejection of the leases are required by the Act of June 18, 1934, 38 Stat. 993 (28 U.S.C.A., Sec. 124a) or otherwise to pay the taxes levied against a terminal company, which taxes are the direct obligation of the lessors.

2. Whether or not the trustees of the property of a railroad operating the property of lessor railroads under Section 77 (c) (6) of the Bankruptcy Act for the account of the lessor roads are required by Section 65 of the Judicial Code (28 U.S.C.A., Sec. 124) or otherwise to pay the interest on the Terminal Company bonds, it being the express duty of the lessor railroads to pay their proportionate shares of such interest.

3. Whether or not the obligations imposed by Section 77 (c) (6) of the Bankruptcy Act require operation by the lessee after the lessor's account has been exhausted, and if so, whether such construction violates the Fifth Amendment to the Constitution of the United States.

STATUTES INVOLVED.

The statutes involved are the Act of June 18, 1934, 48 Stat. 993 (28 U.S.C.A., Sec. 124a), Section 65 of the Judicial Code (28 U.S.C.A., Sec. 124), Section 77 of the Bankruptcy Act (11 U.S.C.A. 205), and Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896.

STATEMENT.

In 1888 the Boston and Providence Railroad Corporation let its property to the Old Colony Railroad Company for a term of 99 years (R., pp. 129–143); and in 1893 the Old Colony let its property, including its leasehold interest in the Boston and Providence property, to The New York, New Haven and Hartford Railroad Company, also for a term of 99 years (R., pp. 72–80). At that time the City of Boston was served by the lines of the two lessors and by the New England Railroad Company and the Boston and Albany Railroad Company. After the lease of 1893, the properties of the two lessors were operated by the New Haven as parts of its railroad system.

In 1896 The Boston Terminal Company was incorporated by an Act of the Massachusetts legislature (Massachusetts Acts and Resolves, 1896, Ch. 516) to provide a union station for passengers on railroads entering the southerly part of the City of Boston. That Act requires (Sec. 9) all said railroad companies to use the terminal for all their terminal passenger business in Boston, said railroad companies being those companies referred to in Section 2 of the Act, namely, the Boston and Albany, the Boston and Providence, the Old Colony, the New England and The New York, New Haven and Hartford, being lessee of the Old Colony. Section 10 of the Act requires the five named railroads to pay to the Terminal Company for such use, the amounts necessary to cover the expenses of the Terminal Company including the interest upon its bonds. The Act of 1896 was amended in 1921 (Massachusetts Acts, 1921, Ch. 363) to include the New York Central. In the meantime, the New England had been merged into the New Haven (R., p. 16; Massachusetts Acts and Resolves, 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, Sec. 4). Thus the New Haven and the New York Central became the only

users of the terminal, all other companies enumerated in Section 2 of Chapter 516 having been leased or merged. The use of the terminal over the former New England line terminated prior to these proceedings (R., p. 16).

In 1931 the Department of Public Utilities of Massachusetts determined under Section 10 of the Act the proportion of use of the terminal at seventy per cent for the lines operated by the New Haven (including the Old Colony and Boston and Providence) and thirty per cent for the line operated by the New York Central (Boston and Albany) (R., p. 155). No reapportionment has been made since that time.

Upon approval, on October 23, 1935, of the petition of the New Haven for reorganization there came into the custody of the District Court, as a part of the system of lines operated by the New Haven, the lines of the Old Colony and the Boston and Providence. Continued operation of the system was provided for (R., pp. 44–52) and trustees were appointed (R., pp. 53–56). Both the Old Colony and the Boston and Providence leases have been rejected by the New Haven and Old Colony Trustees, respectively (R., pp. 66, 113), and the New Haven Trustees have continued to operate both lines for the account of the former lessors under orders so providing (*Palmer* v. *Palmer*, 2 Cir., 104 F. (2d) 161, cert. den. 60 S. Ct. 120; *Palmer* v. *Warren*, 2 Cir., 108 F. (2d) 164, affd. sub. nom. *Warren* v. *Palmer*, 60 S. Ct. 865 (1940); R., p. 69; p. 72; pp. 81–82; p. 87; p. 92; p. 112), pursuant to Section 77 (c) (6) (R., p. 186).*

The operations by the trustees of the New Haven of the Old Colony and Boston and Providence have been conducted at a large operating deficit each year. These deficits have

---

* The District Court entered its order approving Old Colony's petition for reorganization in the New Haven proceedings on June 3, 1936 (R., pp. 81–83). The Boston and Providence has been in reorganization under Section 77 since August 5, 1938, in the District Court of the United States for the District of Massachusetts (R., pp. 126–128).

been met by the New Haven Trustees out of New Haven funds and now exceed $20,000,000. It has become apparent that the prior lien afforded the New Haven is not a sufficient security to warrant the diversion of additional funds without jeopardy to the New Haven's own creditors (R., p. 187). On their petition filed October 19, 1939, the District Court granted the New Haven trustees an order instructing them to withhold further payment of real estate taxes, franchise taxes, and bond interest of the Boston Terminal Company (R., p. 20). The Circuit Court of Appeals reversed the decision of the District Court because it found that Section 77 (c) (6) of the Bankruptcy Act was constitutional (R., p. 191); because it construed the provisions of Section 124a (28 U.S.C.A., Sec. 124a) to require the payment by the trustees of the New Haven of taxes legally assessed so long as operation under Section 77 (c) (6) continued (R., pp. 193, 194); and because it construed the provisions of Section 124 (28 U.S.C.A., Sec. 124) as requiring the trustees of the New Haven to comply with the provisions of the Massachusetts statute of 1896 (Mass. Stat. 1896, ch. 516) so long as operation under Section 77 (c) (6) continued (R., pp. 194–196). The Circuit Court of Appeals also found that the record presented no evidence that the costs of operation of the Terminal Company, including bond interest, were unreasonable (R., p. 196).

SUMMARY OF ARGUMENT.

Certiorari should not be granted in this case because:

1. The decision of the Circuit Court of Appeals with respect to the constitutionality of Section 77 (c) (6) of the Bankruptcy Act is correct and in accord with previous decisions of this Court, and with the decisions of other federal courts.

2. The decision of the Circuit Court of Appeals that the provisions of Chapter 516 of the Acts of the General Court

of Massachusetts for the year 1895 are a valid exercise of the police power of the Commonwealth is in accord with previous decisions of this Court and the decisions of other federal and state courts.

3. The construction by the Circuit Court of Appeals of the provisions of 28 U.S.C.A., Sec. 124a and the provisions of 28 U.S.C.A., Sec. 124 is correct and not in conflict with any applicable decision of this Court or with the decision of another circuit court of appeals on the same matter.

ARGUMENT.

I.

Section 77 (c) (6) of the Bankruptcy Act was passed by the Congress because public convenience often necessitates continued operation of a leased line even after rejection of the lease. An express duty is placed upon the lessor to operate such lines unless the judge of the District Court shall, after hearing, decree "that it would be impracticable and contrary to the public interest for the lessor to operate the said line" and in which case the duty of the lessee is to continue operation until abandonment is authorized by the Interstate Commerce Commission (49 U.S.C.A., Sec. 1). Even though the lease has been rejected, if considerations of practicability and the public interest lead to an order under the provisions of Section 77 (c) (6) directing continued operation of the formerly leased lines, the burden of operation, and consequently of meeting the expenses of operation, survives rejection.

The District Court as a part of its opinion argued that further operation under Section 77 (c) (6) should not be required after the lessor's account had become exhausted. As the Circuit Court of Appeals held, such a construction would not only violate the primary purpose of Section 77 (c) (6) to safeguard the interest of the public in continued

operation of the road, but would also usurp the power specifically delegated to the Interstate Commerce Commission of ultimate continuance or discontinuance of service. The responsibility of such abandonment of service has been placed by Congress with the Commission, and the New Haven trustees are in no way deprived of life, liberty or property without due process of law by the decision of the Circuit Court of Appeals, as these trustees have now and have had in the past the right to request the Commission to release the trustees from the duties and expenses of operation imposed by Section 77 (c) (6) through a petition to the Commission for abandonment of both the Old Colony and the Boston and Providence lines or either of them.

Colorado v. *United States*, 271 U.S. 153 (1926).
Palmer v. *Massachusetts*, 308 U.S. 79 (1939).

II.

Section 25 of Chapter 516 of the Acts of the General Court of Massachusetts for the year 1896 makes the using railroads named in Section 2 of the statute directly liable for real estate taxes (R., p. 154). Sections 9 and 10 of the statute require the said railroad companies to use the terminal company facilities for all of their terminal passenger business in Boston and to pay for such use, including taxes and interest upon the bonds of the Terminal Company (R., p. 8). There is nothing in the record to indicate that the charges are unreasonable (R., p. 196). There can be no doubt that this Massachusetts statute is a valid exercise of the police power of the state.

Mayor and Aldermen of Worcester v. *Norwich & Worcester R. R. Co.*, 109 Mass. 103 (1871).
Los Angeles Passenger Terminal Cases, 100 I.C.C. 421 (1925); 142 I.C.C. 49 (1928).

R. R. Comm. v. *Southern Pacific Co.*, 264 U.S. 331 (1923).

I. C. C. v. *Los Angeles*, 280 U.S. 52 (1929).

Atchison Ry. v. *Railroad Commission*, 283 U.S. 380 (1931).

III.

The Act of June 18, 1934, 48 Stat. 993 (28 U.S.C.A., Sec. 124a) declares that "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. * * *" In *Ingels* v. *Boteler*, 100 F. (2d) 915 (1938), *aff'd.* 308 U.S. 57 (1939) this section was applied generally in spite of an operating loss and the claim by the bankruptcy trustee that he was without funds. Section 124a has been held to apply to a trustee of a railroad under Section 77 of the Bankruptcy Act.

Thompson v. *Lousiana*, 98 F. (2d) 108, 111 (1938).

No decision of this Court or of any Circuit Court of Appeals has limited the general applicability of this section.

There is no basis for the contention that Section 124a is not applicable to trustees operating under the provisions of Section 77 (c) (6). The statute having placed upon the trustees of the New Haven the duty of operating the Old Colony and Boston and Providence roads, the trustees are thereby made the agents of the Court within the clear meaning of Section 124a. Since operation must continue until abandonment has been authorized, even though such operation is at a loss, taxes legally assessed must be paid by the trustees of the New Haven until operation ceases.

Although the respondent in opposition believes it a

matter of no consequence, there was no holding or finding by the Circuit Court of Appeals that "payment of the taxes would represent a cash loss to New Haven creditors that could not be re-collected", and the contrary assertion by the petitioners is an error (Petition, p. 9). The Circuit Court stated that "the prior lien afforded the New Haven is not a sufficient security to warrant the diversion of additional funds, without jeopardy to the claims of New Haven's own secured creditors". (R., p. 187.) Nor does it appear from the record, as claimed by the petitioners on page 9 of their petition, that ultimate payment of the taxes is assured through the lien accruing upon the property against which the tax is laid. On the contrary, in as much as Section 25 of the 1896 Massachusetts Act provides for the real estate to be assessed directly to the using railroads (R., p. 154), it may be seriously questioned whether any lien for such taxes against the real estate of the Terminal Company exists.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this Court nor any decision of any other Circuit Court of Appeals. The decision in the case of *Dulberg* v. *Zankel*, 67 F. (2d) 534, 537 was handed down before the enactment of Section 124a and is in no way relevant to the issues in this case.

In re Pittsburgh Railways Company, decided by the Circuit Court of Appeals for the Third Circuit on April 30, 1940 but not yet reported, is not in conflict with the decision in this case. The Pittsburgh Railways Company proceedings were under Section 77B of the Bankruptcy Act and therefore the situation of trustees operating leased lines under Section 77 (c) (6) was not before that court. The Federal statutes (28 U.S.C.A., Secs. 124 and 124a) were not mentioned.

Section 65 of the Judicial Code (28 U.S.C.A., Sec. 124) reads in part as follows: "Whenever in any cause pending

in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." A criminal penalty is also provided for violation of this section. It is undisputed that the trustees of the New Haven are in possession of and operating and managing the properties of the Old Colony and the Boston and Providence, and it would seem that the words "receiver or manager in possession of any property" are surely broad enough to cover the trustees of the New Haven in managing and operating these lines under the provisions of Section 77 (c) (6).

Converse v. *Massachusetts*, 101 F. (2d) 48, 51 (1939).

Palmer v. *Massachusetts*, 308 U.S. 79, 90, n. 17 (1939).

Section 124 clearly requires compliance with the provisions of Chapter 516 of the Massachusetts Acts of 1896. As has been pointed out above, this statute is undoubtedly a valid exercise of the police power of the state and similar statutes enacted under the police power have been consistently held applicable to railroad receivers.

Erb v. *Morasch*, 177 U.S. 584 (1900).

Pittsburgh & Shawmut Coal Co. v. *Delaware & N. R. Co.* 289 Fed. 133 (D.C. N.D. N.Y.) (1923).

Hornsby v. *Eddy*, 56 Fed. 461 (C.C.A. 8th) (1893).

Pierce v. *Van Dusen*, 78 Fed. 693 (C.C.A. 6th) (1897).

Converse v. *Massachusetts*, 101 F. (2d) 48 (C.C.A. 2d) (1939).

Burke v. *Morphy*, 109 F. (2d) 572 (C.C.A. 2d) (1940).

As stated by the Circuit Court, "such a statute may properly impose the costs of construction and operation upon the railroads concerned, as long as the expense is not so great as to be confiscatory, when considered in relation to the importance of the interests to be affected and to be served" (R., p. 195).

Atchison, Topeka & Santa Fe R. Co. v. *Railroad Commission,* 283 U.S. 380, 396 (1931).

Therefore so long as the Massachusetts statute is in force it must be obeyed, there being nothing in the record to indicate that the charges are unreasonable, much less confiscatory (R. p. 196).

The statement in the petitioner's brief on page 11 that admittedly operation into the terminal will continue whether or not the Terminal Company bond interest is paid is not correct. The bonds are now in default and if the interest is not paid it may well be that an application on the part of the bond trustee to take possession and to foreclose would be favorably entertained by the District Judge in Massachusetts. But even if the use of the terminal were to continue whether or not the bond interest and taxes are paid that can in no way relieve the trustees of the New Haven from the duties imposed upon them by the Federal statutes. Such an argument is nothing more than an effort to cloud the real issues. A similar observation may be made as to the argument of the petitioners on pages 11 and 12 of their petition that the decision below "requires petitioners to pay bond interest of the Terminal Company during the New Haven reorganization proceedings". Of course, it does no such thing. The New Haven trustees may at any time request the Interstate Commerce Commission for permission to abandon either or both the Old Colony and Boston and Providence lines. As the Circuit

Court of Appeals states, Congress has placed this responsibility upon the Commission (R., p. 191).

The decision of the Circuit Court of Appeals with respect to the applicability of Section 124 is not in conflict with any decisions of this Court nor any decision of a Circuit Court of Appeals.

CONCLUSION.

The respondent respectfully urges that the petition for certiorari be denied in view of the facts that:

1. Petitioner has not adduced any authority which casts doubt upon the correctness of the decision of the Circuit Court of Appeals.

2. No conflict of authority is shown to be involved nor is any novel question of law presented.

Respectfully submitted,

Robert H. Davison,

Attorney for the Respondent.

APPENDIX.

MASSACHUSETTS ACTS AND RESOLVES, 1896, Ch. 516:

"Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

In the

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 120.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of the New York, New Haven and Hartford Railroad Company,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

BRIEF FOR THE RESPONDENT.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 120.

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONERS,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE, RESPONDENT.

BRIEF FOR THE RESPONDENT.

I.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Connecticut has not been officially reported; it appears in the present record on pages 12 to 19 inclusive. The opinion of the Circuit Court of Appeals is reported in 111 F. (2d) 215, and appears on pages 185 to 196 inclusive of the record.

II.

JURISDICTION.

The Circuit Court of Appeals entered its order May 16, 1940 (R., p. 197). No petition for a re-hearing was filed.

The jurisdiction of this Court is invoked by the petition-

ers under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 347).

The petition for writ of certiorari was filed on June 1, 1940 and the writ was granted October 14, 1940.

III.

THE ISSUE.

The principal issue raised in this case is whether the United States District Court for the District of Connecticut, sitting as a court of bankruptcy in railroad reorganization proceedings under Section 77 of the Bankruptcy Act, had authority prior to the adoption of a plan of reorganization, without the concurrence of the Interstate Commerce Commission, and contrary to the Massachusetts statute and the lawful order of the Massachusetts Department of Public Utilities made thereunder, to authorize the trustees of the estate of the New York, New Haven and Hartford Railroad Company to withhold a part of the compensation expressly prescribed by a statute of the Commonwealth of Massachusetts for the use of the property of The Boston Terminal Company, namely, payments of real estate taxes on the said property of the Boston Terminal, franchise taxes assessed by the Commonwealth of Massachusetts against said Company, and interest upon the bonds of said Company.

IV.

STATEMENT OF THE CASE.

The petitioners are the trustees of the property of the New York, New Haven and Hartford Railroad in railroad reorganization proceedings under Section 77 of the Bankruptcy Act (11 U.S.C.A. 205). The Boston Terminal Company itself, although substantially the adversary party in interest on the respondent's side of the case did not become formally a party to these proceedings for reasons hereinafter explained. The actual respondent is the present trustee under the mortgage indenture securing the bonds of The

Boston Terminal Company. Its predecessor trustee appeared in the proceedings in the District Court and initiated the opposition which resulted in reversal of the order of that court.

In 1888 the Boston and Providence Railroad Corporation leased its property to the Old Colony Railroad Company for a term of 99 years (R., pp. 129-143); and in 1893 the Old Colony leased its property, including its leasehold interest in the Boston and Providence, to The New York, New Haven and Hartford Railroad Company, also for a term of 99 years (R., pp. 72-80). In 1893 the City of Boston was served from the south and west by the lines of the two lessors and by the New England Railroad Company and the Boston and Albany Railroad Company. After the lease of 1893, the properties of the two lessors were operated by the New Haven as parts of a single railroad system, *i.e.*, the New Haven system.

In 1896 the Massachusetts legislature passed a special act (Massachusetts Acts and Resolves, 1896, Ch. 516) incorporating The Boston Terminal Company for the purpose of providing a union passenger station and adequate terminal facilities for railroads entering the southerly part of the City of Boston. Section 2 of the Act fixes the capital stock of the Company at $500,000 and empowers each of the five railroads named in that section, including the New Haven, to subscribe for and hold one fifth of the capital stock of The Boston Terminal Company, and Section 3 requires each of the five named railroads to appoint one member of a board of five trustees, to which board was committed the government and direction of the affairs of The Boston Terminal Company. The Act requires (Sec. 9) all said railroad companies to use the terminal for all their terminal passenger business in Boston, said railroad companies being those companies referred to in Section 2 of the Act, namely the Boston and Albany, the Boston and Providence, the Old Colony, the New England and The New York, New

Haven and Hartford, being lessee of the Old Colony. Section 10 of the Act requires the five named railroads to pay to the Terminal Company for such use the amounts necessary to cover the expenses of the Terminal Company including the interest upon its bonds and taxes. Each of the named railroads is required to pay in the proportion in which it uses, such proportion in default of agreement by the railroads to be determined by the board of railroad commissioners, to which board the Department of Public Utilities is the successor (R., pp. 154, 155). Section 25 of the Act requires the Terminal Company to pay a franchise tax to the Commonwealth upon the value of its capital stock and provides that the real estate of the Terminal Company required to be used by the railroad companies for terminal purposes shall be assessed to and the taxes thereon paid by the said railroad companies. The Act of 1896 was amended in 1921 (Massachusetts Acts, 1921, Ch. 363) to enable the New York Central which had, subsequent to 1896, leased the Boston and Albany to exercise the powers of its lessor. In the meantime, the New England had been merged into the New Haven (R., p. 16; Massachusetts Acts and Resolves, 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, Sec. 4). Thus the New Haven and the New York Central became the only users of the terminal, all other companies enumerated in Section 2 of Chapter 516 having been leased or merged. It is stated that use of the terminal over the former New England line terminated prior to these proceedings (R., p. 16).[a]

On July 17, 1931 the Department of Public Utilities of

[a] Nevertheless, use of the terminal by the New Haven trustees over the New England line has been re-commenced. See Report of the Special Commission to Investigate Railroad Transportation Facilities within the Commonwealth, created under Chapter 64 of the Massachusetts Resolves of 1939. This report states on page 60: "Due in the main to the efforts and insistence of this Commission, train service was restored between Boston and Caryville through Medfield Junction and Millis on the lines of the New England on March 10, 1940. This could be done only after the Trustees caused to be relaid tracks which had been ripped up after the order of Judge Hincks in July 1938." The report is dated December 4, 1940. Since printed copies are not yet available, the page reference is to the typewritten copy filed with the General Court of Massachusetts.

Massachusetts acting upon the petition of the New Haven under section 10 of the Act entered the following order (R., p. 155) (Appendix to this brief p. 73):

> "After public hearing, the Department determines that the proportion of use of the South Union Station and facilities be fixed at 70% of use by the New York, New Haven and Hartford Railroad Co. and 30% of use by the New York Central Railroad Co., lessee of the Boston & Albany Railroad Co. Alan Brooks, Executive Secretary."

No reapportionment has been made since that time.

Upon approval, on October 23, 1935, of the petition of the New Haven for reorganization there came into the custody of the United States District Court for the District of Connecticut, as a part of the system of lines operated by the New Haven, the lines of the Old Colony and the Boston and Providence. (Compare *Warren* v. *Palmer*, 310 U.S. 132 [1940].) Continued operation of the system was provided for (R., pp. 44-52) and trustees were appointed (R., pp. 53-56). The District Court for the District of Connecticut entered its order approving Old Colony's petition for reorganization in the New Haven proceedings on June 3, 1936 (R., pp. 81-83). The identical persons who had been serving as trustees of the New Haven were appointed as trustees of the Old Colony by said Court. The Boston and Providence has been in reorganization under Section 77 since August 5, 1938, in the District Court of the United States for the District of Massachusetts (R., pp. 126-128). Both the Old Colony and the Boston and Providence leases have been rejected by the New Haven and Old Colony trustees, respectively (R., pp. 66, 113) and the New Haven trustees have continued to operate both lines for the account of the former lessors pursuant to Section 77 (c) (6) under orders so providing (R., p. 186).

The New Haven and the trustees of the New Haven paid

the prescribed proportion of the taxes on the terminal property due the City of Boston and paid the prescribed proportion of the other charges required to be paid by Sections 10 and 25 of the Act of 1896 and continued to do so until the District Court, on October 30, 1939, granted the New Haven trustees on their petition filed October 19, 1939 an order, No. 398, instructing them to withhold further payment of real estate taxes due the City of Boston upon the terminal property and franchise taxes and bond interest of The Boston Terminal Company (R., p. 20).[1] The trustees of the New Haven, when the petition for Order No. 398 was filed, were in control of three fifths of the stock of The Boston Terminal Company, one fifth being their original subscription under the Act; one fifth having been acquired through the merger of the New England and one fifth through the identity of the New Haven and Old Colony trustees in bankruptcy. Furthermore, the New Haven trustees as such had control of the naming of the two members of the board of five trustees of the Terminal Company whom the New Haven in its original right and as successor to the New England had the right to designate under the Massachusetts statute and these identical persons in their capacities as trustees of the Old Colony had control of naming a third member of the board whom the Old Colony had the right to designate. Thus, at this time three of the five managers of The Boston Terminal Company were subject to the control of the three individuals who were the New Haven trustees. The Boston Terminal Company did not appear at the hearings on the petition for Order No. 398 to object to it, even though the interests of The Boston Terminal Company were

[1] There are pending before the Supreme Judicial Court of Massachusetts proceedings in which is involved the question whether income received by the Terminal Company from other sources than the using railroads is to be considered in determining the total amount which the using railroad companies are required to pay as compensation for the use of the terminal. That particular question of statutory construction is not involved in the instant case and nothing that may be said in this brief is to be construed as a statement that other income received by the Terminal Company may properly be taken into account in determining the total amount which the statute requires the using railroad companies to pay as compensation for the use of the terminal.

adversely and vitally affected.[2] The respondent's predecessor as trustee for the holders of The Boston Terminal Company bonds presented such objections to the petition as were made on behalf of the Terminal Company, and later became a party to the proceedings for the special purpose of appealing from Order No. 398 (R., p. 23).

The District Court, in its memorandum of decision on petition for Order No. 398 (R., p. 12) based its decision principally upon two grounds. First, that following the rejection of the Old Colony lease (R., p. 66) the use of the Boston Terminal was in legal contemplation by the Old Colony and the Boston and Providence and not by the New Haven trustees. Second, that although the New Haven trustees were operating the lines of the Boston and Providence and the Old Colony by virtue of an order entered by the Judge of the District Court, pursuant to Section 77 (c) (6) (R., pp. 44-52), their liability for the payment of the items named in the petition and Order No. 398 ceased when the account of the lessors had been exhausted, and that otherwise Section 77 (c) (6) would be in conflict with the Fifth Amendment to the Constitution of the United States. The Judge of the

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[2] The New Haven trustees and the New York Central, as lessee of the Boston and Albany, had first appropriated all income received by the Terminal Company from other sources, such as rentals from concessions and the like and applied this income to the statutory expenses of the terminal and, after such moneys had been used, had together made up only the balance of the payments for the use of the terminal (including bond interest and franchise taxes and the real estate taxes assessed with respect to the Terminal Company property), so that the total receipts of the Terminal Company had exactly balanced the total payments by it, without leaving any surplus whatever. This practice had continued for many years and therefore, as a direct result of Order No. 398, the Terminal Company was rendered insolvent within the meaning of Section 77 of the Bankruptcy Act. Consequently on November 3, 1939 certain creditors of the Boston Terminal Company filed a petition for its reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Massachusetts. On November 13, 1939 the Terminal Company filed an answer admitting its insolvency, and on November 20, 1939 the District Court of Massachusetts entered an order approving the petition as properly filed and on December 18, 1939 appointed three trustees of the debtor's property. On February 26, 1940 the Interstate Commerce Commission made an order ratifying the appointment of one of these three as sole trustee. On March 7, 1940 the said order was filed in the District Court of Massachusetts and on the same day the trustee qualified. In the meantime, on March 6, 1940 the appeal from Order No. 398 had been argued before the Circuit Court of Appeals for the Second Circuit.

District Court completely ignored the 1931 order of the Massachusetts Department of Public Utilities.

The Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court, holding that Section 77 (c) (6) of the Bankruptcy Act was constitutional; (R., p. 191); construing the provision of 28 U.S.C.A. Section 124a to require the payment by the New Haven trustees of taxes legally assessed under the provisions of the Massachusetts Act of 1896 so long as operation under Section 77 (c) (6) continued; and construing the provision of 28 U.S.C.A. Section 124 as requiring the New Haven trustees to comply with the provisions of the Massachusetts Act of 1896 so long as operation under Section 77 (c) (6) continued. The Circuit Court of Appeals applied Sections 124 and 124a upon the assumption that the New Haven trustees were using the terminal facilities only through their operations of the lines of the Boston and Providence and Old Colony under Section 77 (c) (6) and held that the obligations imposed by the Sections continued so long as operations continued, even though the New Haven trustees were compelled to go for funds to the New Haven estate. The Circuit Court of Appeals also found that the record presented no evidence that the charges for use of the Terminal Company, including taxes and bond interest, were unreasonable (R., p. 196).

V.

SUMMARY OF THE ARGUMENT.

Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896 required the construction of the Boston Terminal and the use of it by the railroads named therein. The New Haven was one of the railroads so named. It is required that the named railroads use the terminal and pay for such use such amounts as are necessary to pay the expenses of the corporate administration of The Boston Terminal Company and of the mainte-

nance and operation of the station, including insurance, repairs, all taxes required to be paid by the Terminal Company, and interest upon the bonds of the Terminal Company. It is provided that each of the named railroads shall pay for the use of the terminal and the facilities of the station in the proportion in which it has their use.

The Massachusetts Act of 1896 was a valid exercise of the police power of the Commonwealth.

In accordance with the provisions of the Act, the Massachusetts Department of Public Utilities determined, in 1931, that the proportion of use was 70% by the New Haven and 30% by the New York Central, lessee of the Boston and Albany, and this order has never been revised nor has revision been sought by the petitioners.

The New Haven and the New Haven trustees are liable under the Massachusetts Act to pay 70% of all of the enumerated expenses, including bond interest and taxes and this liability, imposed upon the New Haven by the Massachusetts Act, was placed upon the trustees of the New Haven by the provisions of 28 U.S.C.A., Sections 124 and 124a. The obligation of the Massachusetts Act and the order of the Department of Public Utilities under said Act did not end because of the bankruptcy of the New Haven or the disaffirmance by the New Haven of its lease from the Old Colony, and the District Court was without power to enter its Order No. 398, ordering the trustees of the New Haven to withhold payment of bond interest, franchise taxes and real estate taxes.

Even upon the supposition,—which the respondent does not admit,—that upon disaffirmance of the Old Colony lease the New Haven ceased to be a user of the Boston Terminal, nevertheless, the trustees of the New Haven continued to use the terminal in their operation of the lines of the Old Colony and the Boston and Providence under the provisions of Section 77 (c) (6) of the Bankruptcy Act and by virtue of

such use the New Haven trustees are liable to pay to the Boston Terminal Company those expenses of the Boston Terminal not allocated to the New York Central Railroad Company.

Even though it be found that the New Haven trustees are not the users of the terminal and that the use is that of the Boston and Providence and the Old Colony, nevertheless the New Haven trustees are liable for 70% of the terminal rental under the provisions of 28 U.S.C.A. Sections 124 and 124a, the trustees being appointees of a United States court and, as such, conducting the business of the Old Colony and the Boston and Providence.

VI.

ARGUMENT.

A. THE MASSACHUSETTS ACT OF 1896 REQUIRES THE NEW HAVEN AS ONE OF THE RAILROADS NAMED THEREIN TO PAY THAT PROPORTION OF THE EXPENSES OF THE BOSTON TERMINAL COMPANY AS ITS USE BEARS TO THE TOTAL USE OF THE TERMINAL.

The contention of the respondent is that the New Haven trustees are obligated to pay the expenses of The Boston Terminal Company and taxes as prescribed by Chapter 516 of the Acts of 1896. This case and that of *Philadelphia Company* v. *Dipple, et al,* Nos. 242, 243 October Term, 1940, in this Court differ sharply. The sole question in *Philadelphia Company* v. *Dipple* is whether or not the trustees of a corporation in reorganization under the provisions of Chapter X of the Bankruptcy Act are obliged to pay the taxes assessed against certain underliers in the possession of the debtor. In the instant case the relationship of the Terminal Company to the New Haven trustees is not that of an underlier. The Terminal Company is a separate and distinct corporation whose only relationship to the New Haven is that created by the Massachusetts Act of 1896. The problems of payment of a compensation for use equivalent to interest upon the Terminal Company bonds, its

franchise taxes and taxes assessed with respect to its real estate are problems in no way raised in the *Dipple* case. There, there was no question of operation of leased lines under a court order entered pursuant to Section 77 (c) (6) and the case involved no direct statutory liability even remotely comparable to the Massachusetts Act of 1896. Regardless of the decision in that case, the liability of the petitioners in the instant case is fixed by the provisions of the statute of the Commonwealth of Massachusetts and by 28 U.S.C.A. Sections 124 and 124a. To appreciate the significance of the Massachusetts Act it is necessary to examine its pertinent sections in detail.

Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896 required construction of the Boston Terminal and use of it by the railroads entering Boston from the South and West. (This Chapter and all acts amendatory thereof are herein referred to as the Massachusetts Act of 1896.)

Section 1 of Chapter 516 (Appendix to this brief, p. 67) incorporated The Boston Terminal Company for the purpose of constructing and maintaining a union passenger station in Boston and providing terminal facilities for the several railroads authorized by the statute to hold its stock, and to provide for the accommodation of the public.

Section 2 of Chapter 516 (Appendix to this brief, p. 67) empowered each of five railroads named in said section to subscribe for and hold one-fifth of the capital stock of The Boston Terminal Company, which was fixed at $500,600. Those roads named were the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and The New York, New Haven and Hartford Railroad Company, "being lessee of the Old Colony Railroad Company." Under this section the New Haven in its own name, and not as lessee subscribed and paid for one thousand shares out of a total of five thousand,

and now by reason of merger also owns the one thousand shares formerly owned by the New England Railroad Company, merged with the New Haven (R. pp. 7, 16).

Section 3 of Chapter 516 (Appendix to this brief, p. 67) vested "the immediate government and direction of the affairs of said terminal company . . . in a board of five trustees, to be appointed at once on the organization of said company, one of whom shall be appointed by each of said railroad corporations from its directors, to hold office as such trustee at the pleasure of the corporation by whom he is so appointed; any vacancy to be filled in like manner." Thus it will be noted that subsequent to the merger of the New England into the New Haven, the New Haven appointed two of the five managing trustees of The Boston Terminal Company, and that since under Section 77 the same individuals have been appointed trustees of both the New Haven and Old Colony (R., pp. 53, 85, 94) the trustees of the New Haven now appoint a majority of the board of trustees of the Terminal Company. It is also significant to note that although the New Haven trustees now claim the direct obligation of the New Haven to the Terminal Company ceased when the Old Colony lease was rejected, nevertheless the New Haven trustees continue to hold the stock and continue to exercise their power of appointment of trustees of the Terminal Company. It is to be noted that the right of the five railroads each to appoint one of the trustees is independent of their right to own stock.[3]

It is a peculiar circumstance that the petition for Order No. 398 was brought by the trustees of the New Haven

[3] The Board of Trustees of the Boston Terminal Company now are:
Arthur P. Russell, President and Director of the Old Colony and Vice President of the New Haven.
James L. Richards, Director of the New Haven, member of its Executive Committee, member of the Planning Committee of the New Haven in reorganization.
R. L. Pearson, Vice President of the New Haven and General Manager in charge of operations.
James L. Truden, General Manager, New York Central, in charge of Boston and Albany.
Charles W. Mulcahy, trustee in bankruptcy of the Boston and Providence.

Railroad who are the same individuals appointed trustees of the Old Colony Railroad (the New Haven owned a majority of the stock of the Old Colony, R., p. 67) and who in that joint capacity have the control of The Boston Terminal Company. Therefore, at the hearing on the petition for Order No. 398 before the District Court for the District of Connecticut, the trustees of the New Haven were not only the petitioners but in control of the Terminal Company itself. It will be noted that the Terminal Company did not protest the entry of Order No. 398 nor did it appeal this Order. The unusual situation was presented in which the plaintiff was also the defendant; had the present respondent not appeared, the interests of the Terminal Company would have been entirely unprotected.

It is the contention of the petitioners that the Massachusetts Act of 1896 was applicable to the New Haven only so long as it continued to be lessee of the Old Colony and that therefore upon rejection by the New Haven trustees of the Old Colony lease neither the New Haven nor the trustees of the New Haven were any longer bound by the Massachusetts Act. This contention of the petitioners assumes that the addition of the descriptive words "being lessee of the Old Colony Railroad Company" represented such an intention on the part of the Massachusetts legislature. An analysis of the Act, however, demonstrates very clearly that this was not the case but that the legislature clearly intended that the New Haven be given the same rights and be subject to the same obligations as the other four railroads originally named. In the first place, the New Haven was given the right to hold the same number of shares of stock of the Terminal Company as were the other named railroads and also given the same right to appoint its representative to the board of five trustees of the Terminal Company. There are no provisions whatever limiting the responsibility of the New Haven under the Act solely

to the period within which it continues to be lessee of the Old Colony. There are no provisions for the surrender by the New Haven of its stock, nor the termination of its right to appoint a trustee of the Terminal Company when it ceased to be a lessee. In fact the New Haven trustees have not divested themselves of the Terminal Company stock owned by the New Haven, but continue up to this minute to hold it. So also, as has been previously pointed out, the New Haven continues to appoint its representative to the board of trustees of the Terminal Company. The inference must be that the Act intended the New Haven to be bound so long as its corporate existence continued. As the petitioners themselves have stated, the Old Colony, Boston and Providence and New England were named in the Act solely because "conceivably the act might not apply to a lessor railroad if its lease were terminated" (R., p. 158). The New Haven was included generally in the Act by Section 2 and the descriptive words, "lessee of the Old Colony Railroad Company" were added, not to limit the obligation of the New Haven, but to explain wh the Old Colony and Boston and Providence were named at all. If the construction of the Act claimed by the petitioners is correct, it would follow that if the New Haven had merged the Old Colony and the Boston and Providence with itself (as, in fact, the New England was merged) and thereby the New Haven ceased to be a lessee of the Old Colony, then it would be relieved from the requirements of the Act and deprived of the benefits of it. If the argument of the petitioners is correct, the New Haven, having merged the Old Colony might claim that it could then construct a different terminal or use any other terminal facilities than those required by the Massachusetts Act of 1896,—a result diametrically opposed to the intent of the Massachusetts legislature as expressed in the Act: "to provide and operate adequate terminal facilities for the several railroad companies here-

inafter authorized to hold the stock of said Terminal Company, and for the accommodation of the public in connection therewith." (Massachusetts Act of 1896, Section 1, Appendix to this brief, p. 67.) The petitioners argue on page 13 of their brief that the amendment of Chapter 516 made by Chapter 363 of the Acts and Resolves of Massachusetts for the year 1921 (see Appendix to this brief, p. 71) supports the contention that the responsibility of the New Haven was limited to the period within which the New Haven was lessee of the Old Colony. On the contrary, examination of the 1921 amendment leads to precisely the opposite conclusion. The 1921 amendment did not increase the capital stock of the Terminal Company but merely gave to the New York Central the right to acquire that stock originally allocated to the Boston and Albany. It did not place the New York Central in a position comparable to that of the New Haven. It did not give the New York Central the right to nominate a trustee of the Terminal Company on its own behalf similar to the right given to the New Haven, but merely allowed the New York Central to exercise the power of its lessor, the Boston and Albany. Section 2 of Chapter 363 provides: "during the existence of the lease of the Boston and Albany Railroad to the New York Central Railroad Company . . . , the New York Central Railroad Company shall exercise all the powers conferred upon the Boston and Albany Railroad Company under the provisions of said chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six, as amended." Very obviously, the legislature intended to limit the rights of the New York Central Railroad Company under the 1896 Act to the period within which it continued to be lessee of the Boston and Albany. The 1931 order of the Massachusetts Department of Public Utilities (R., p. 155) confirms this viewpoint, as by it on the New Haven's own petition seventy per cent of the use of the Boston Ter-

minal is placed upon the New Haven, without reference to its lessors, while the remaining thirty per cent of use is placed upon the New York Central, lessee of the Boston and Albany, presumably limiting the responsibility of the New York Central to the period in which it remains lessee of the Boston and Albany. If the legislature had intended in 1896 to limit the rights and responsibilities of the New Haven, as in 1921 it did those of the New York Central, it would have been a simple matter to have said so.

Section 4 of the Act (Appendix to this brief, p. 68) authorized the Terminal Company to provide means for carrying out the purposes of the Act by issuing from time to time coupon or registered bonds to such an amount as was necessary and approved by the Board of Railroad Commissioners. The Terminal Company was authorized to mortgage its real estate as security for such bonds. The section further provides that if any mortgage which secures bonds of the Terminal Company is foreclosed and an insufficient sum realized to pay the outstanding bonds, the railroad companies shall be liable to pay any deficiency "in such proportions as may be just and equitable, having regard to the use which they or their lessees may have respectively had of the mortgaged property." The Supreme Judicial Court is given jurisdiction in equity to determine the proportions of such deficiency payable by the respective railroad companies and to compel payment "so that the full payment of the principal and interest of bonds issued under the provisions of this act by the terminal company shall not in any event fail." This same section provides for approval of any mortgage by the Board of Savings Bank Commissioners and makes investment in such bonds legal for savings banks. It also provides that any such mortgage shall be made to a trustee or trustees approved in writing by the Board of Savings Bank Commissioners.

This section is important not only because it specifically authorizes the issue of bonds by the Terminal Company but expressly makes those bonds legal investments for the savings banks of the Commonwealth and thus attempts to surround these bonds with every precaution for their payment both as to principal and interest. It should also be noted that Section 4 of the Act limits the interest rate upon these bonds to four per centum per annum, a further clear indication that the Massachusetts legislature intended these bonds to be for sound investment and not the means for speculation. The attention of the Court has been called to the provision of Section 2 of the Act limiting the capital of the company to only $500,000, to be supplied by the using railroads. By way of contrast it is pertinent to note that the total principal amount of bonds issued by The Boston Terminal Company and now outstanding in the hands of the public is $15,155,000 (R., p. 7). It was, therefore, depositors in savings banks, policy holders in insurance companies and conservative investors seeking safety of investment rather than a large return, who were induced to provide and did provide the money for the erection of the Terminal, and it was not money provided by the railroads.

Sections 5, 6, 7 and 8 of Chapter 516 (Appendix to this brief, pp. 69, 70, 71) empowered the Terminal Company to purchase or take certain real estate and required the Terminal Company forthwith to prepare plans and specifications for approval by the Board of Railroad Commissioners and the Mayor of Boston and thereupon required the Terminal Company to construct the station in accordance with such plans. These sections also required the Terminal Company on completion of the station to make reasonable rules and regulations for the station's use.

Section 9 of Chapter 516 (R., p. 8) requires "all said railroad companies" (referring to the five railroads named

in Section 2) to use the terminal for all of their passenger terminal business in Boston and the Supreme Judicial Court of Massachusetts is expressly given jurisdiction to enforce this provision. It will be noted that Section 9 makes it obligatory for the New Haven to use the Boston Terminal and no other terminal in Boston for its passenger business.

Section 10 of Chapter 516 (R., p. 8) repeats the requirement that the named railroads use the terminal and provides for payment for such use upon a pay-as-you-use basis. This section reads as follows:

> "Section 10. Said railroad companies hereby required to use said union station shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock. *Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof,* the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all of the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. *The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies,* and the payments re-

quired to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process." (Italics supplied.)

It is to be particularly noted that this section obligates all of the named railroads to pay as compensation for their use of the terminal the entire expenses of the Terminal Company, including interest upon its bonds and taxes required to be paid by it.[4] This obligation is positive and without qualification. Each of the named railroads is to pay in the proportion in which each has the use of the terminal, the proportion to be determined by agreement or, in case of failure to agree, to be determined by the Board of Railroad Commissioners, to which Board the Department of Public Utilities is the legal successor (R., pp. 154, 155). The petitioners on page 14 of their brief dismiss very lightly the 1931 order of the Department of Public Utilities, stating that this order did not purport to fix a liability upon the New Haven but merely fixed a proportion of use, leaving the matter of liability to Section 10 of the Act. (This order is set forth in full at p. 73 of the Appendix to this brief.) This position of the petitioners is quite different from that taken by them in their brief before the Supreme Judicial Court of Massachusetts in a collateral matter now pending, in which they state: ". . . We, your petitioners, are paying the 70% of the Terminal expenses, which in 1931 it was decided should be the proportion of the New Haven system. The Boston & Providence are paying the Terminal Company nothing. Were the Boston & Providence Trustees operating their properties, were they a separate user, the statute clearly would apply. But the Boston & Providence are not using their property, nor using the Terminal, nor making any

[4] See note 2 on page 7 of this brief.

payments therefor. . . .'' (R., p. 160.) They also state in their conclusions to the same brief: ''that it is the New Haven Trustees, and not the Boston & Providence Trustees who are using the Boston Terminal, in connection with the operation of the Boston & Providence properties.'' (R., p. 177.)

Under the provisions of Section 10 of the Act ''the decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies . . .'' It is obvious that under Section 10 of the Act the order of the Department of Public Utilities was far more than a mere fixing of proportion of use. It was necessarily a determination of what railroads used the terminal and in what proportions. The responsibility of determining proportions of payment was rightly delegated to this administrative board and their order is binding upon the named railroads and expressly enforceable by the Supreme Judicial Court of Massachusetts either by mandatory injunction or by other suitable process. It should also be particularly noted that this section of the statute provides expressly that all the payments made by the using railroads including the interest upon the Terminal Company's bonds and taxes required to be paid by it are to be deemed a part of their operating expense although the obligation placed upon the railroads to pay for use of the terminal is in no way limited to the operating expenses of the Terminal Company but includes all amounts prescribed by the Massachusetts Act of 1896, whatever they may be.

Sections 11 through 24 inclusive of the Act contain various provisions relative to the taking of land and the surrender of previously existing freight and passenger stations. These sections are not pertinent to the issues involved in the present case except as they demonstrate the compulsory nature of the exclusive use of the Terminal.

Section 25 of Chapter 516 reads as follows:

> "Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

In connection with this section it should be brought to the attention of this Court that under tax laws in force in Massachusetts when the Act of 1896 was passed, and still in force every railroad corporation chartered by or organized under the laws of the Commonwealth of Massachusetts [5] is required to pay to the Commonwealth a franchise tax based upon the fair value of its capital stock after deducting the value of real estate which is locally assessed and taxed.

Public Statutes of Massachusetts (1882), ch. 13, ss. 39, 40.

General Laws of Massachusetts (Ter. Ed.) ch. 63, ss. 53 to 60, inclusive, as amended.

Section 25, however, allows the Terminal Company no deduction from its franchise tax on account of its real estate, but by providing that its real estate shall be assessed to and the taxes thereon paid by the railroad companies named in the Act, rather than to the Terminal Company itself, permits these railroad companies a deduction for the purpose of their franchise taxes of the value of the real estate of the Terminal Company. Rather than providing for the named railroads to pay these taxes to the Terminal Company together with the other items set out in Section 10, to be in turn paid to the City by the Terminal Company, for

[5] The New Haven is a corporation chartered by the Commonwealth of Massachusetts.

franchise tax reasons the real estate taxes are provided to be paid directly by the using railroads in order that they might secure the same tax benefit as if they were the actual owners of the real estate. Payment of the real estate taxes, however, is just as much a part of the obligation of the using railroads to compensate for the use of the terminal as is the payment of any of the items enumerated in Section 10, and is part and parcel of the statutory obligation of the Terminal Company to erect and maintain terminal facilities and the obligation of the railroads to use these terminal facilities exclusively and to pay for such use as determined by the statute of Massachusetts.

B. SUBSEQUENT TO THE LEASE BY THE OLD COLONY TO THE NEW HAVEN IN 1893, THE LINES OF THE BOSTON AND PROVIDENCE AND THE OLD COLONY WERE OPERATED AS INTEGRAL PARTS OF THE NEW HAVEN SYSTEM.

In considering the problems and issues raised in the present case, it will be helpful to consider briefly the background of the New York, New Haven and Hartford Railroad system in so far as it affects Boston and Eastern Massachusetts. Prior to 1893 the shore line of the New Haven ended at Providence and the New Haven possessed no direct route into Boston connecting its shore line division. (*Baker, Formation of the New England Railroad Systems* (1937), pp. 42, 43.) The only roads into Boston from the south which could be used by the New Haven were the lines of the Boston and Providence Railroad from Providence to Boston which were under lease to the Old Colony Railroad Company (R., p. 129) and the lines of the New England Railway which ran through Hartford and Willimantic to Boston, an indirect route and one which passed over many steep grades and other geographical obstacles. (*Baker, op. cit.*, pp. XVI, XVII.) In 1888 the Boston and Providence had been leased to the Old Colony for ninety-nine years (R., p. 129). In 1893 the entire properties and franchises of

the Old Colony were leased to the New Haven for ninety-nine years (R., p. 72) and thereafter the lines of the Old Colony including those of its lessor, the Boston and Providence, were operated by the New Haven and have continued to be so operated ever since. (*Rood, Protecting the User Interest in Railroad Reorganization, Law and Contemporary Problems,* Vol. VII, p. 495 at pp. 498, 499.) After 1893 although the Old Colony and the Boston and Providence continued their corporate existences, they ceased to exist as operating railroads and became no more than bookkeeping devices. On the former lines of the Old Colony and the Boston and Providence, the engines and cars of the New Haven alone operated and the signs, tickets, bills of lading, time tables and conductors all bore and still bear only the name of the New Haven. (*Rood, op. cit.,* p. 499.) It was, in other words, a complete and unified control of the Old Colony lines, including the Boston and Providence, by the New Haven. The lease for ninety-nine years was for the longest term permitted by Massachusetts statutes and a close examination of the lease reveals that the transaction was in its nature a merging of the Old Colony and the Boston and Providence into the New Haven system (R., p. 72).

The lease of March 1, 1893 (R. p. 72) from the Old Colony to the New Haven was of the entire assets of the Old Colony, lock, stock and barrel including the lease of the Boston and Providence and excepting only "the corporate seal, the stockholders' and directors' record books, and the transfer and stock books." (R., p. 73.) The New Haven covenanted to pay as rent a sum equal to dividends at the rate of seven per cent. per annum upon the capital stock of the Old Colony and to pay all taxes assessed upon the Old Colony or upon its capital stock directly to the taxing authorities. It is significant also that the New Haven covenanted that it would exchange nine shares of New Haven stock for ten shares of the stock of the Old Colony (R., p. 76). This exchange provision is customary in a merger or consolidation

and is an unusual provision in a lease. (*Meck and Masten, Railroad Leases and Reorganizations,* 49 Yale L. Jour. 626, 630, n. 17.)

Thus in 1896 when the General Court of Massachusetts passed legislation requiring the construction of a union passenger terminal in Boston and requiring the named railroads to use this terminal, the Old Colony and the Boston and Providence had become by lease parts of the New Haven system; and later control of the New England was acquired by the New Haven. (*Mass. Acts of 1905,* Ch. 252, *Baker, op. cit.*, p. 94., R., p. 16.)

C. THE MASSACHUSETTS ACT OF 1896 IS A VALID EXERCISE OF THE POLICE POWER OF THE COMMONWEALTH AND NOT INCONSISTENT WITH THE INTERSTATE COMMERCE ACT.

At the time the Massachusetts Act of 1896 was passed a state could, under its police power, compel railroads engaged in interstate commerce to build a railroad terminal station within the state and could fix the terms and conditions governing the use of the terminal by such interstate railroads. This power was and is subject only to the general limitations that it must be exercised reasonably and that the charges imposed must not be so great as to be confiscatory.

> *Mayor and Aldermen of Worcester* v. *Norwich & Worcester R.R. Co.*, 109 Mass. 103 (1871).
> *Atchison, Topeka & Santa Fe R.R.* v. *Railroad Commission* 283 U.S. 380, 396 (1931).

This record presents no evidence that the power was exercised unreasonably or that the charges are unreasonable, much less confiscatory (R., p. 196).[6] The district court did

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[6] The Massachusetts Act of 1896 did not go so far as to compel the railroads to build and pay for a terminal. This terminal was built from the money of savings banks, insurance companies and the public which bought the Terminal Company bonds, and the only monetary requirements placed upon the railroads were that they were to pay for their use of the terminal, and were to make up any deficiency if the bond mortgage was foreclosed.

not find that the charges were unreasonable or confiscatory. The Circuit Court of Appeals said: "This record does not present any evidence that the charges are unreasonable or any basis for a declaration that the law is invalid."

In 1896 there were no provisions of the Interstate Commerce Act (U.S.C.A. Title 49, Chapter 1) which qualified this police power. Neither the Transportation Act of 1920 nor the Transportation Act of 1940 took away from the States their power to order interstate railroads to construct and operate terminal stations, but only added the requirement that the Interstate Commerce Commission issue a certificate of convenience and necessity for necessary relocation of tracks (U.S.C.A. Title 49, Chapter 1, section 1, par. 18 to 21; Public Act No. 785, 76th Congress, 3d Session, 1940).

Atchison, Topeka & Santa Fe R.R. v. *Railroad Commission*, 283 U.S. 380 (1931).

The Interstate Commerce Commission has taken the position that the Transportation Act of 1920 gave it no mandatory power to compel railroads to build and operate terminal facilities, and this position has been sustained by this Court.

Los Angeles Passenger Terminal Cases, 100 I.C.C. 421 (1925); 142 I.C.C. 489 (1928).

Railroad Commission of California v. *So. Pacific Co.*, 264 U.S. 331 (1924).

I.C.C. v. *Los Angeles*, 280 U.S. 52 (1929).

It may, therefore, be assumed that the power to compel the erection and operation of terminal facilities by interstate railroads remains with the several states, and with it the power to impose upon the railroads using such terminal facilities the payment of their costs and expenses, and to fix the standard of such payment which in this case is based upon use.

D. THE MASSACHUSETTS ACT OF 1896 IMPOSED AN OBLIGATION TO PAY FOR THE USE OF THE BOSTON TERMINAL ACCORDING TO THE ORDER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

1. This obligation rested upon the New Haven before its bankruptcy.

This Section D of the brief considers those payments required by the Massachusetts Act of 1896 to be made to the Terminal Company. Real estate taxes which under the Act are paid to the City of Boston are considered in Section E of this brief. Both types of expenses are, nevertheless, required by the Act to be paid as compensation for the use of the terminal.

Section 10 of the Massachusetts Act of 1896 provides that the said railroad companies required to use the Boston Terminal shall pay in monthly payments to the Terminal Company such amounts as may be necessary to pay the expenses of its corporate administration, the expense of maintenance and operation of the station, all insurance and repairs, all taxes and assessments, and interest upon its bonds (R., p. 8). The payment by the Terminal Company of a franchise tax to the Commonwealth of Massachusetts is expressly required by Section 25 of the Act (R., p. 154). The payments by each of the railroads are to be "in the proportion in which it has the use thereof", such proportion to be fixed by written agreement of the railroads, but failing such agreement the board of railroad commissioners (the Department of Public Utilities is its legal successor, R., pp. 154, 155) is given the authority to determine the proportion of use and consequently the percentage of payments. In 1931 the Department of Public Utilities upon the petition of the New Haven ordered "that the proportion of use of the South Union Station and facilities be fixed at 70% of use by the New York, New Haven and Hartford Railroad Co., and 30% of use by the New York Central Railroad Co., lessee of the Boston & Albany Railroad Co." (R., p. 155.) Pursuant to this order the New Haven paid to The

Boston Terminal Company seventy per cent. of its expenses including interest upon its bonds and taxes, and continued to do so until the beginning of the reorganization proceedings.

The New Haven never sought revision of the 1931 order of the Department of Public Utilities.

It seems clear that the delegation by the Act of 1896 of the administrative task of determining the proportion of use of the terminal by the several railroads was a proper delegation. This proportion of use was bound to vary at different times and could not have been determined once and for all by the Act. It was proper for the legislature to delegate to an administrative body the duty of determining from time to time the use made of the terminal by the railroads using it if the railroads failed to agree among themselves, and thus to fix the contributive shares of these roads of the terminal charges. That *use* is a proper standard for the determination of compensation is clearly recognized.

Interstate Commerce Act, Section 3, paragraph (4) (U.S.C.A. Title 49, Chapter 1), *Transportation Act of 1940*, Public Act No. 785, 76th Congress, 3rd Session.

U.S. ex rel. v. *Interstate Commerce Commission*, 71 F. (2d) 336, 340 (App. D. C. 1934), aff'd 294 U.S. 50 (1935).

Therefore, from 1931 at least up to October 23, 1935 (the date of the order of the District Court of the United States for the District of Connecticut approving the petition of The New York, New Haven and Hartford Railroad Company for reorganization under Section 77 of the Bankruptcy Act) the New Haven by virtue of the Massachusetts Act of 1896 and the order of the Department of Public Utilities in conformity with it (R., p. 155) was directly obligated to pay seventy per cent. of the expenses of The Boston Terminal Company including interest upon that company's bonds and franchise taxes payable to the Commonwealth of Massachusetts. From 1931 until its bankruptcy in October 1935 the New Haven in fact obeyed the 1931 order of the Depart-

ment of Public Utilities without objection. Had the New Haven failed to pay, the Terminal Company could under Section 10 of the Act have obtained from the Supreme Judicial Court of Massachusetts a mandatory injunction to compel such payments to be made. That obligation of the New Haven enforceable by the Supreme Judicial Court of Massachusetts was not a secondary obligation of the New Haven arising under its lease of the Old Colony, but a direct obligation of the New Haven itself because of its own use of the terminal. The Terminal Company would not have had any legal right to enforce payment except against those railroads named in the 1931 order of the Department of Public Utilities and in the proportions determined in that order. The Terminal Company could not at least before October 23, 1935 proceed against the Old Colony Railroad or the Boston and Providence Railroad for any part of the money required for the expenses, taxes and bond interest of the Terminal Company.

2. This obligation rested upon the New Haven trustees from the time of bankruptcy to disaffirmance by the New Haven trustees of the Old Colony lease.

The approval on October 23, 1935 by the District Court of the United States for the District of Connecticut of the petition of The New York, New Haven and Hartford Railroad Company for reorganization under the provisions of Section 77 of the Bankruptcy Act did not of itself affect the liability of the New Haven estate to The Boston Terminal Company. For some time after October 23, 1935 the trustees of the New Haven continued to operate the lines of the Old Colony and the Boston and Providence under the provisions of the lease from the Old Colony to the New Haven. The Old Colony lease to the New Haven was not disaffirmed until June 2, 1936 (R., p. 66).[7] While the lease was in force the New Haven trustees remained liable to the Terminal Com-

[7] The Boston and Providence lease to the Old Colony was not disaffirmed until July 19, 1938 (R., p. 113).

pany, however, not because of the leases but because the New Haven estate was *in fact* the user of the Boston Terminal and under the Massachusetts Act of 1896 and the order of the Department of Public Utilities pursuant thereto was legally and directly liable. Neither the Old Colony nor the Boston and Providence had any operating organization or owned any rolling stock or equipment (R., pp. 69, 112) and it was the trains and crews and passengers of the New Haven which used the terminal. While it may be true that the rights of way and rails which led up to the outer boundary of the terminal yards were owned in fee by the Old Colony and Boston and Providence, these rights of way and steel rails did not use the terminal;—it was the New Haven trains which used the terminal for the convenience of New Haven passengers, for the loading and unloading of New Haven express, and for the delivery of the U. S. mails; the revenue therefrom benefiting the New Haven estate.

Since the New Haven trustees continued to operate the business of the New Haven Railroad Company and continued to use the terminal facilities in the same way as they were used prior to the bankruptcy the trustees of the New Haven were bound directly under the Massachusetts Act of 1896. This statute is properly extended by construction to include the trustees of the New Haven. The trustees stand in the place of the corporation itself, they have sole possession of the railroad and its property, and conduct its business and exercise its franchises.

Wall v. *Platt*, 169 Mass. 398 (1897).

However, it is not necessary to rely solely on this contention as the trustees of the New Haven are in any event bound by the provisions of the Massachusetts Act of 1896 by virtue of Section 65 of the Judicial Code (28 U.S.C.A., Section 124).[8]

[8] 28 U.S.C.A. s. 124 (1887), which is sec. 65 of the Judicial Code, states that "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof".

As this court stated in *Palmer* v. *Massachusetts*, 308 U.S. 79, note 17, p. 90 (1939) "Section 65 of the Judicial Code (36 Stat. 1104, 28 U.S.C., section 124) decisively indicates that Congress did not intend that those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power."

Erb v. *Morasch*, 177 U.S. 584 (1900).
Gillis v. *California*, 293 U.S. 62 (1934).
Sullivan v. *Hustis*, 237 Mass. 441 (1921).

It still remained true that, during this period, the Terminal Company, under the unrevised order of the Department of Public Utilities of the Commonwealth of Massachusetts, could not have looked either to the Old Colony or to the Boston and Providence but only to the trustees of the New Haven for the proportions of the payments required by the Massachusetts statute and the said order to be made by the New Haven to the Terminal Company.[9]

No revision of the 1931 order of the Department of Public Utilities was sought by the New Haven trustees.

3. This obligation rested upon the New Haven trustees after disaffirmance by the New Haven trustees of the Old Colony lease.

When, after the Old Colony lease (and later the Boston and Providence lease) was disaffirmed, the New Haven trustees continued to use these lines for the operation of their trains, the New Haven trustees continued to be the actual users of the terminal, (R., pp. 158, 159) and by no reasoning can it be held that the act of disaffirmance of the

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[9] The petitioners on p. 16 of their brief assume that "* * * * mere use of the terminal by petitioners in behalf of Old Colony and Boston and Providence under the Act of 1896 of course obligates the estates of the two former lessors to pay the price fixed for that use." The respondent disagrees with that assumption which was also the assumption of the Judge of the District Court.

lease in some way made the Old Colony and the Boston and Providence railroads, having no operating organizations, owning no rolling stock nor equipment whatever, the users of the terminal in place of the New Haven trustees. Indeed, the orders requiring the New Haven trustees to operate the lines of the Old Colony and of the Boston and Providence were predicated upon the fact that neither of those railroad companies was in a position to operate its own lines. The plain truth is that the New Haven used the facilties of the terminal since it was built in 1898 and that the New Haven trustees have continued to use it and do now use it. Legal relationships between the New Haven, the Old Colony and the Boston and Providence may have changed, and new questions of accounting between them may have arisen, but the physical use of the terminal by the New Haven trustees has continued without interruption or change whatsoever. Railroad trains and passengers have continued to use the terminal, and certainly these trains and passengers have not been those of the Old Colony or the Boston and Providence, which railroads for many years have been mere bookkeeping devices. Indeed, if it be argued by the petitioners that there was a physical cessation by them of the use of the Boston Terminal, it would seem that would constitute an abandonment requiring the prior consent of the Interstate Commerce Commission (*Chicago & Alton R.R. Co.* v. *Toledo, Peoria & Western Ry. Co.*, 146 I.C.C. 171, 179-181 (1928), or possibly the written approval of the Massachusetts Department of Public Utilities after notice and public hearing (Massachusetts General Laws (Tercentenary Edition) ch. 160, ss. 128, 129; Massachusetts Acts of 1901, ch. 330; Appendix to this brief, pp. 72, 73). Since the disaffirmance of the leases, as before disaffirmance, it remains true that the Terminal Company could not have looked and cannot now look to the Old Colony or to the Boston and Providence but only to the New Haven trustees

for the proportions of the payments required by the Massachusetts statute and the order of the Department of Public Utilities to be paid by the New Haven for the use of the terminal. In fact, up to the entry on October 29, 1939 of Order No. 398, the New Haven trustees still continued to comply with the statute and the order made pursuant thereto.

No attempt was made by the New Haven trustees to have the 1931 order of the Department of Public Utilities revised but, on the contrary, the New Haven trustees actively opposed the efforts of the Boston and Providence to bring about such a re-determination (R., p. 156).

On May 25, 1938, the Judge of the District Court confirmed and accepted the report of the Interstate Commerce Commission on segregation of system earnings and expenses (R., p. 96). Previously, on June 2, 1936, the Old Colony lease had been disaffirmed (R., p. 66). Subsequently, on July 19, 1938, the Boston and Providence lease was disaffirmed (R., p. 113). The petitioners, on page 5 of their brief, for some reason state as a fact that the accounting for the use of the Boston Terminal has been accomplished by means of this segregation of expenses and revenue approved by the Interstate Commerce Commission. Throughout the brief (*cf.* petitioners' brief, p. 16) the petitioners assume that the segregation order is in some way an instruction or order respecting the Terminal Company and, in some obscure manner, takes precedence over the 1931 order of the Department of Public Utilities. In making these assumptions, the petitioners disregard the true purpose of a segregation order, which is primarily, as clearly stated in Section 77 (c) (10), of the Bankruptcy Act, to permit "such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the

various mortgages or deeds of trust, or are separately subject to lease. . . .".

In Re Chicago, R. I. & P. Rwy. Co., 108 F. (2d) 410 (C.C.A. 7th, 1939).

The segregation order had nothing whatever to do with the obligations owing to The Boston Terminal Company, or to the City of Boston on account of real estate taxes assessed upon the property of The Boston Terminal Company, which obligations were imposed upon the users of the Terminal by the Massachusetts Act of 1896. The Terminal Company neither was nor could have been a party to the proceedings resulting in the segregation order. If anything further were needed to demonstrate the fact that the segregation order did not attempt to instruct the New Haven trustees with reference either to the Boston Terminal charges or to any other similar charges, the language of the Interstate Commerce Commission in their report (*New York, New Haven and Hartford Railroad Company Reorganization*, 224 I.C.C. 723, 725 [1938]) is conclusive:—"Our recommendations herein are in no wise intended to express any views with respect to the use of the results obtained from the application of the formula or the weight to be given such results."

Although the Interstate Commerce Commission approved the segregation formula as "as fair and equitable as the circumstances will permit", nevertheless the application of that formula is not predetermined by it, but on the contrary it has been expressly held by the Circuit Court of Appeals that the Boston and Providence is free to oppose the application of the formula to its own account.

Palmer v. *Warren*, 108 F. (2d) 164, (C.C.A. 2d, 1939), aff'd 310 U.S. 132 (1940).

It is entirely clear, therefore, that not only does the segregation order fail to bind The Boston Terminal Company or the respondent herein but it does not even bind the New

Haven lessors. So far as the Terminal Company is concerned and so far as the Massachusetts Act of 1896 and the order of the Department of Public Utilities made thereunder are concerned, the segregation order has absolutely no effect. Nor is it any concern of the Terminal Company or the respondent herein what bookkeeping method the New Haven trustees may adopt as between themselves and their lessors.

4. The Judge of the District Court in the New Haven proceedings was without authority to enter Order No. 398, ordering the New Haven trustees to withhold payment of bond interest and taxes.

The Act of 1896 and the order thereunder of the Department of Public Utilities were binding upon the New Haven and upon the trustees of the property of the New Haven, and nothing has occurred to relieve them of this responsibility. The obligation was not terminated upon disaffirmance of the Old Colony lease because it did not arise as a part of that lease, but was imposed by the Act of 1896. The only legal action purporting to relieve the New Haven of its obligation to the Terminal Company is order No. 398 of the United States District Court for the District of Connecticut now under review by this Court.

The Massachusetts Act of 1896 and the 1931 order of the Department of Public Utilities, both being in the proper exercise of the police power of the Commonwealth of Massachusetts, cannot be interfered with by a United States Court unless Congress has expressly delegated such power to the United States Court. There is no provision of Section 77 of the Bankruptcy Act which purports to give to the Federal Courts the power to over-ride a state statute validly enacted under the police power of the state, except possibly upon confirmation of a plan of reorganization approved by

the Interstate Commerce Commission, (Section 77, (f)).[10] The Department of Public Utilities of Massachusetts has determined that the New Haven is the user of seventy per cent. of the terminal facilities, and that determination has never been revised. In fact, as has been previously pointed out, the New Haven trustees have resisted an attempt to change that determination (R., p. 156). Order No. 398 in effect nullifies the Massachusetts Act and the order of the Department of Public Utilities under that Act.

It is abundantly clear that for many years, and even long before the enactment of the Massachusetts Act of 1896, the necessary dependence of local interests on local transportation services has properly made the regulation of such services a matter within the jurisdiction of local regulatory boards.

I.C.C. v. *Los Angeles*, 280 U.S. 52 (1929).

The District Court has no power to deal with a matter within the jurisdiction of the State unless Congress gave such power.

Palmer v. *Massachusetts*, 308 U.S. 79, 83 (1939).
Thompson v. *Magnolia Petroleum Company*, 309 U.S. 478 (1940).
Note 50 Yale Law Journal, 165, 168 (1940).

Therefore, if this old established power of the state has been withdrawn by the enactment of Section 77 of the Bankruptcy Act, clear language must be found to justify so radical a change. As is stated by Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U.S. 79, at page 84, "There-

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[10] Section 77 (f), 11 U.S.C.A. s. 205 (f):
"* * * Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding * * * *."

fore, in construing legislation this court has disfavoured inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases*, 230 U.S. 352." There is no specific grant of such power in Section 77 nor does the historic background of this section warrant such an inference.

> *Palmer* v. *Massachusetts*, 308 U.S. 79, pp. 86-89, incl. (1939).

In fact the inference is the exact opposite. Section 77 (f) of the Bankruptcy Act provides that upon confirmation of a plan of reorganization, it shall be put into effect, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding." Moreover, Section 77 (d) provides that no plan shall be confirmed unless first approved by the Interstate Commerce Commission and certified to the court.[11] Only in this limited way and with the prior approval of the Interstate Commerce Commission after public hearings may a judge of a district court abrogate a state law or the order of a state authority. By Order No. 398 the District Judge has taken upon himself sole and uncontrolled power to abrogate a state law, an attempted exercise of a power not delegated by section 77. As stated by Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U.S. 79, at page 89,

> "But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesmanlike imagination that transcends the wisdom of local attachments."

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[11] Section 77 (d), 11 U.S.C.A. s. 205 (d):

"* * * No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

It is submitted, therefore, by the respondent that the United States District Court for the District of Connecticut was entirely without authority to enter its Order No. 398, in the New Haven reorganization proceedings.

The effect of Order No. 398 entered by the District Court is to authorize the use of the Boston Terminal by the New Haven trustees without provision for payment for such use. Section 10 of the Massachusetts Act of 1896 provides that the using railroads shall pay "such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company . . .". The District Court by Order No. 398 authorized the New Haven trustees to cease payment of bond interest and franchise taxes but left upon the New Haven trustees the duty of paying seventy per cent of all the other expenses of the terminal including the expenses of its corporate administration, the maintenance and operation of the station, insurance and repairs. Thus the result that Order No. 398 sought to bring about was to set aside a fraction of the statutory obligations and leave in full force and effect the balance of the statutory obligations imposed by the very same statute.

Order No. 398 of the District Court is abhorrent to one's sense of propriety. Here, under the order of the Department of Public Utilities the charges for use are apportioned only upon the New Haven in its own right and upon the New York Central as lessee of the Boston & Albany. The Terminal Company is as much bound by that order as the two railroads. The result of the order of the District Court, therefore, is to exempt the only user except the Boston and Albany from paying part of the obligations for terminal use, while requiring it still to pay for other expenses of

use such as corporate administration, maintenance and operation, insurance and repairs. Under the order of the Department of Public Utilities no liability of any kind was imposed upon the Old Colony and the Boston and Providence. Much less was there any apportionment of a part of the charges for use upon those railroads. Hence Order No. 398 was the equivalent of an order that henceforth the Terminal Company should be paid absolutely nothing by anybody for two major items of the rental, namely, franchise taxes and bond interest, except for the 30% payable by the New York Central. As has already been pointed out, the Terminal Company could not sue and collect any part of the terminal charges from either the Old Colony or the Boston and Providence. Since the order of 1931, the Old Colony and the Boston and Providence are strangers so far as the Terminal Company is concerned.[12]

That Congress in enacting Section 77 did not intend to endow the District Court with such authority as it exercised in the instant case seems clear by examining that provision of the Interstate Commerce Act giving to the Interstate Commerce Commission power to require a terminal company to open the use of its facilities to other roads. (Transportation Act of 1940, Section 3(5). Appendix to this brief, p. 66.) Congress in granting that power to the Interstate Commerce Commission carefully guarded the interests of terminal companies by providing that if such use were required, compensation for such use "shall be paid or adequately secured before the enjoyment of the use may be commenced." In this same section, the Interstate Commerce Commission was given power to determine proper compensation for such use but clearly was given no power to authorize use without compensation. The powers assumed by the District Judge acting alone in issuing Order No. 398 are far greater, and are clearly beyond the powers delegated by

[12] See footnote No. 9 on page 30 of this brief.

the Congress, even to its expert administrative agency, the Interstate Commerce Commission. The District Court made no pretense of determining proper compensation, but arbitrarily eliminated certain items prescribed by the Massachusetts statute.

Missouri-Kansas-Texas R. Co. v. *Kansas City Terminal Co.*, 198 I.C.C. 4 (1933).

E. REAL ESTATE TAXES UPON THE PROPERTY IN BOSTON OWNED BY THE TERMINAL COMPANY AND USED FOR TERMINAL PURPOSES WERE PAYABLE BY THE NEW HAVEN TRUSTEES IN THE PROPORTION OF THEIR USE OF THE TERMINAL.

Section 25 of the Massachusetts Act of 1896 provides that the real estate of the Terminal Company required to be used by said railroad companies be assessed to and the taxes thereon paid by said railroad companies (R., p. 154). Except that real estate taxes are payable directly to the City by the railroads, the real estate taxes as part of the compensation for use of the terminal property differ in no way from the items of bond interest, franchise taxes and other expenses discussed above in this brief. The real estate taxes were payable by the New Haven before its bankruptcy; thereafter the New Haven trustees continued to be liable (and actually continued to pay said taxes until the entry of Order No. 398), and this liability was not affected by rejection of the Old Colony and the Boston and Providence leases.

For the year 1939 these taxes were assessed by the Assessors of the City of Boston to the "Boston and Albany Railroad and New York, New Haven and Hartford Railroad Company, *Lesses* [*sic*] of New England Railroad Company, Boston and Providence R.R. Company and Old Colony R.R. Company." (R., p. 179.) Section 25 differs from Section 10 in that proportion of use is not expressly prescribed with reference to real estate taxes. It is fair to assume, however, that the proportion of real estate taxes to be

borne by the named railroads should be measured by the use made by them of the terminal. The language of Section 25 "its real estate required by this act to be used by said railroad companies" warrants no other implication except that use shall be the measure of liability. Furthermore, there being no other provision of the Act allocating the share of the real estate taxes to be borne, it is proper that the standard of use as expressed in Section 10 be also applied with respect to taxes on the real estate of the Terminal Company. Such a construction has always been adhered to by the using railroads. Moreover, this assumption is apparently acquiesced in by the petitioners as in their petition for Order No. 398 they state (R., p. 6) that the proportion of real estate taxes on the terminal property due is seventy per cent. of the total, the same use proportion as determined by the Department of Public Utilities in their 1931 order (R., p. 155). It is, we believe, well established that use is a proper yardstick to measure compensation (Respondent's brief, p. 27).

It is apparent that Section 25 did not contemplate payment of real estate taxes to the City of Boston by the Terminal Company and subsequent repayment to the Terminal Company by the using railroads. It contemplated a payment to the City of such taxes directly by the using railroads. If, however, these taxes are not paid, the City might undertake to claim a lien on the property itself prior to the claims of the bondholders and therefore the liability of the New Haven trustees to the City of Boston may properly be argued by the respondent.

The real estate taxes for 1939 were assessed in accordance with Section 25 of the Act to the Boston and Albany Railroad and New York, New Haven and Hartford Railroad Company (R., p. 179). The addition of the words "*Lesses* of New England Railroad Company, Boston and Providence R.R. Company and Old Colony R.R. Company" are mere

surplusage, they are the words of the local assessors, they are purely descriptive and not even accurately descriptive. The New England had been merged with the New Haven (R., p. 16) the Old Colony lease disaffirmed in 1936 (R., p. 66) and the Boston and Providence lease disaffirmed in 1938 (R., p. 113). At the time of the assessment, the New Haven was the lessee of none of these roads and the Boston and Albany never had been. To treat the reference to the merged New England and the formerly leased Old Colony and Boston and Providence in the assessment of taxes as being a limitation of the scope of the assessment on the New Haven to its capacity as lessee of these other railroads would be to render the assessment a nullity. The presumption is contrary.

In re Lang Body Co., 92 F. (2d) 338, 341, (C.C.A. 6th, 1937) *cert. denied* 303 U.S. 637 (1937).
Union Refrigerator Transit Co. v. *Lynch*, 177 U.S. 149, 154 (1900).

The only legal action purporting to relieve the New Haven trustees of the liability for taxes due the City of Boston for the year 1939 is Order No. 398 of the District Court which is now under review.

It is submitted that the District Court was without power to order payment of these taxes to be withheld. They were required to be paid under the Massachusetts Act of 1896 and by the assessment made under the provisions of Section 25 of that Act. It is not necessary to repeat the arguments heretofore made regarding the power of the Federal courts to over-ride a state statute, validly enacted under the police power of the state. It is sufficient to repeat that a clear delegation of such power by the Congress must be found. That Section 77 of the Bankruptcy Act contains no such terms we believe we have demonstrated. The real estate taxes here in question were assessed directly to the New Haven and the obligation of its trustees is clear, not

because they were lessees but because the statute and the assessment made pursuant to it placed this liability upon the New Haven. The Massachusetts Act of 1896 is properly extended by construction to include the trustees of the New Haven.

Wall v. *Platt*, 169 Mass. 398 (1897).

That this liability is upon the New Haven trustees is confirmed by Section 65 of the Judicial Code (28 U.S.C.A., 124a),[13] which squarely place it upon the trustees of the New Haven. This Court and circuit courts of appeals have supported the position of the respondents.

Boteler v. *Ingels*, 308 U.S. 57 (1939).

Palmer v. *Massachusetts*, 308 U.S. 79, 90, note 17 (1939).

Thompson v. *Louisiana*, 98 F. (2d) 108, (C.C.A. 8th, 1938).

Furthermore, if the New Haven trustees have any complaint with reference to the impropriety of the assessment they have adequate remedies under the Massachusetts statutes. The General Laws of Massachusetts, (Ter. Ed.) Chapter 59, contain provisions for abatements by the assessors upon application and for appeal to the Appellate Tax Board and these provisions are supplemented by Chapter 58A establishing the Appellate Tax Board and also providing for application from that Board to the Supreme Judicial Court of Massachusetts, the decision of which court in a proper case would finally be reviewable by this Court.

The instant case is not one of a lessee's liability for its

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[13] The Act of June 18, 1934, C. 585, 48 Stat. 993 (28 U.S.C.A. Sec. 124a) provides as follows:

"Any receiver, liquidator, referee, trustee or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after the enactment of this Act, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however*, That nothing in this Act contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to the approval of this Act, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivision of the State or States imposing the same."

lessor's obligation, as erroneously assumed by the Judge of the District Court (R., p. 17). The obligation here involved is that of the New Haven and the New Haven trustees alone.

F. THE OPERATION UNDER SECTION 77 (c) (6) BY THE NEW HAVEN TRUSTEES OF THE LINES OF THE OLD COLONY AND BOSTON AND PROVIDENCE MAKES THE NEW HAVEN TRUSTEES RESPONSIBLE FOR THE PAYMENTS REQUIRED BY THE MASSACHUSETTS ACT OF 1896.

1. The use by the New Haven trustees under Section 77 (c) (6) is that of the New Haven trustees and not that of the Boston and Providence or the Old Colony or their respective trustees.

It is contended by the trustees of the New Haven that upon rejection by them of the Old Colony and the Boston and Providence leases, the direct obligation of the New Haven trustees under the Department of Public Utilities order of 1931 to pay seventy per cent of the expenses of The Boston Terminal Company ended. It is the contention of the respondent, however, that the obligation upon the trustees of the New Haven to pay their proportionate share of the expenses of the terminal remains a direct obligation even if the rejection of the leases is material, because the New Haven trustees are using the terminal in their operations under the provisions of Section 77 (c) (6).[14] The Judge of the United States District Court for the District of Connecticut decreed, after hearing, that it would be impracticable and contrary to public interest for the Old

[14] Section 77 (c) (6), 49 Stat. 911, 915, (11 U.S.C.A. s. 205 (c) (6)):

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

Colony or the Boston and Providence to operate their lines after the leases had been disaffirmed by the New Haven (a situation which had been brought about by the New Haven itself), and consequently the trustees of the New Haven were ordered to continue operation for the account of the lessors until abandonment was authorized by the Interstate Commerce Commission (R., pp. 87, 112). Pursuant to this order, the New Haven trustees operated their equipment over the lines of the Boston and Providence and the Old Colony and continued so to operate. The trustees of the New Haven, having been ordered to operate over the lines of the Boston and Providence and the Old Colony and having, in fact, operated their trains over such lines and having, in fact, used the facilities of the Boston Terminal for the loading and discharge of their passengers, and for their express and mail business, cannot discontinue such operation under Section 77 (c) (6) until such discontinuance is authorized by the court with the approval and authorization of the Interstate Commerce Commission. If discontinuance of the operation of the Boston and Providence and the Old Colony should be authorized, and the New Haven should not operate over the New England tracks, then the New Haven trustees might cease to be users of the Boston Terminal and the Massachusetts Department of Public Utilities could properly so find. The remedy of the New Haven trustees would then be to appear before the Department of Public Utilities seeking a revision of their 1931 order or possibly relief might be had from the Interstate Commerce Commission as a part of the abandonment proceedings.

However, the District Court even with the approval of the Interstate Commerce Commission could not authorize the discontinuance of the use of the Boston Terminal and permit the New Haven to exercise some other means of carrying on its terminal business in Boston as such an abandonment order would be in violation of the Massachusetts Act of 1896 requiring the railroads named in that Act

to use the Boston Terminal for all of their terminal passenger business in Boston and this state statute can only be set aside if at all as a part of the plan of reorganization approved by the Interstate Commerce Commission after public hearings and confirmed by the District Court. In no event, does the District Court have authority to order these trustees not to pay for what they use.

2. Even though the use under Section 77 (c) (6) were that of the Boston and Providence and the Old Colony, the New Haven trustees would be liable to pay for such use.

Even if the assumption be made that in fact the Old Colony and the Boston and Providence are the users of the Boston Terminal, though this assumption is exceedingly difficult to make in view of the admitted facts that neither the Old Colony nor the Boston and Providence have any rolling stock or equipment of their own, nevertheless the trustees of the New Haven are obligated under the provisions of Section 77 (c) (6) to pay the prescribed statutory rental to The Boston Terminal Company as the New Haven trustees are operating the lines of the former lessors. It is a definite duty of the New Haven trustees to continue operation of these lines until abandonment of these lines is permitted by the Department of Public Utilities or by the Court, with the approval and authorization of the Interstate Commerce Commission.

Palmer v. *Massachusetts*, 308 U.S. 79, 87, 88 (1939).

The use of the Boston Terminal is an essential and necessary part of the operation of these lines. Obviously the provision of terminal facilities for the passengers of these lines is as essential a service as the heating and lighting of passenger cars. The essential, necessary functions of the New Haven trustees as operators of these three lines

are not concluded by abandoning passengers, the United States mails and baggage and express in the middle of a field. The furnishing of suitable facilities for boarding and leaving trains and for the purchase of transportation and the like is obviously an essential and necessary part of the operation of these three lines and the expense thereof is a necessary expense of operation. It is equally clear that so long as the lessee is obligated to operate the leased lines for the account of the lessor, the lessee must pay the operating expenses of the leased lines. Order No. 398 of the District Court in the New Haven proceedings rests upon no consideration as to whether continued use of the Boston Terminal is or is not in the public interest, but is predicated solely upon the assumption that if a lessor has no funds out of which expenses of its own operation can be paid, although the lessee has a duty under Section 77 (e) (6) to continue operation of the leased lines and although The Boston Terminal Company may be under an obligation to permit the continued use of its facilities in connection with such operation, nevertheless the lessee is not obligated to pay the prescribed cost of such use of the terminal. The interest of the public looking toward uninterrupted service to the communities served by the leased lines (unless the abandonment of the leased lines be authorized by the Interstate Commerce Commission) requires that the expenses of operation be met by the lessee even though the lessee may have to go to its own coffers to meet the expenses, especially since the situation requiring such operation was brought about by the lessee. (*Rood op. cit.*, p. 498, 499.)

It is respectfully submitted that the Judge of the District Court overlooked the primary purpose of Section 77 (e) (6) which is, in the interest of the public, to safeguard continued operation of a railroad.

Warren v. *Palmer*, 310 U.S. 132, 140 (1940).

The remedy of the lessee is before the Interstate Commerce

Commission and not before the Judge of the United States District Court. If the loss in operation of the leased lines be too burdensome, the Interstate Commerce Commission has the power to authorize abandonment of such leased lines. The responsibility has been placed with the Commission by the Congress, and no power has been granted to the Federal courts giving a judge in his discretion the right to authorize abandonment of the leased lines, let alone abandonment of the terminal, or to require the use of the terminal without payment therefor, or with only partial payment. The New Haven trustees have no right under Section 77 (c) (6) to continue that portion of the operation of the lines of the New Haven, the Old Colony and the Boston and Providence involving use of the Boston Terminal for terminal passenger business in Boston and at the same time to withhold payment of current charges arising out of such use.

Compare *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U.S. 262 (1910).

As has been pointed out above, such assumption of power by the District Court is far more than that given by Congress to the Interstate Commerce Commission in giving the Commission power to compel joint use of terminal facilities. Real estate taxes, franchise taxes and bond interest are all a part of the compensation required by the Massachusetts Act of 1896 for use of the terminal property and the New Haven trustees are therefore obligated to pay such charges. That the New Haven trustees, if this be so, may have a first lien on the leased property imposed to secure them is beside the point.

Warren v. *Palmer*, 310 U.S. 132 (1940).

The Judge of the District Court assumed that the bond interest, franchise taxes and real estate taxes were not

charges indispensable to the continuance of the operation of the leased lines (R., p. 17). It is respectfully suggested that the Judge of the District Court confused expenses of and directly chargeable to the leased lines and expenses of The Boston Terminal Company. It is admittedly essential that the New Haven trustees use the facilities of the terminal in operating the leased lines under the provisions of Section 77 (c) (6) and it is not, therefore, pertinent to inquire into whether or not the compensation prescribed by the Massachusetts Act for the use of these terminal facilities is essential or non-essential. In order to use the terminal in connection with the operation of the leased lines it is necessary to pay the compensation for use fixed by the Massachusetts statute and it is no concern of the District Court to inquire into the various items which make up that compensation, there being no evidence that these charges, as a whole, were unreasonable. The District Judge seems to have confused a situation involving merely bond interest, franchise taxes and real estate taxes of the lessors themselves with the real situation, which involves certain items fixed by statute as compensation for the use of an independent terminal which terminal must be used as an incident to the required operation of the lessors' lines.

It is the contention of the respondent that the provisions of Section 77 (c) (6) standing alone obligate the lessee and its trustees to continue the operation of the lessor lines just as before bankruptcy, and that this duty carries with it the obligation to pay the compensation required by the Massachusetts Act of 1896 for the use of the terminal. For the trustees to divest themselves of this statutory obligation, definite legislative sanction must be found. That the intent of Congress was the exact reverse is clear from the provisions of 28 U.S.C.A., Sections 124 and 124a, the applicability of which sections will be discussed in the following section of this brief.

G. EVEN THOUGH THE USE UNDER SECTION 77 (c) (6) WERE THAT OF THE BOSTON AND PROVIDENCE AND THE OLD COLONY, THE NEW HAVEN TRUSTEES WOULD BE LIABLE TO PAY FOR SUCH USE UNDER THE PROVISIONS OF 28 U.S.C.A. SECTIONS 124 AND 124a.

The Judges of the Circuit Court of Appeals did not deem it necessary to pass upon the basic questions argued in sections A to F inclusive of this brief. It is the contention of the respondent, as set out above, that the petitioners are liable for the expenses of the Boston Terminal, including bond interest and taxes, and for the real estate taxes payable to the City of Boston because the New Haven itself and its trustees have used and continue to use the facilities of the terminal; that this use continued without regard to the disaffirmance of the Old Colony lease; and that the New Haven trustees by virtue of 28 U.S.C.A., Sections 124 and 124a are liable directly to the Terminal Company or the City of Boston, as the case may be, because of their own use of the terminal. The respondent contends that the question is not one of Paul being asked to pay the debts of Peter, as is stated by the District Court (R., p. 17), but of Paul being asked to pay his own obligations.

The Circuit Court of Appeals did not deem it necessary to consider whether or not the New Haven trustees were themselves using the terminal as operators of the New Haven, because it held that even though the Old Colony and the Boston and Providence were the companies directly responsible for interest and taxes, nevertheless Sections 124 and 124a were broad enough to cover the case of a railroad operating under Section 77 (c) (6) only for the account of a lessor road. That is, even though trustees of the Pennsylvania Railroad, if it were in reorganization, or trustees of any other railroad not named in the Massachusetts Act of 1896, had operated the Old Colony and the Boston and Providence, they would have been liable to pay the interest, taxes

and other sums required by the Massachusetts Act of 1896. If the question is approached from the viewpoint of the respondent, the fundamental question is one of use by the New Haven itself, a railroad expressly named in the Massachusetts Act, and that therefore by virtue of Sections 124 and 124a the New Haven trustees are liable, regardless of the status of the Old Colony and the Boston and Providence.

However, it is respectfully submitted that the construction by the Circuit Court of Appeals of Sections 124 and 124a is correct.

1. Section 124a requires the payment by the New Haven trustees of the real estate taxes assessed by the City of Boston upon the Boston Terminal property.

Section 124a provides that any trustee authorized by any United States Court to conduct any business shall be subject to all state and local taxes applicable to such business. This section, as has been pointed out above in this brief, has been held applicable to a trustee of a railroad under Section 77.

Thompson v. *Louisiana*, 98 F. (2d) 108 (C.C.A. 8th, 1938).

It has also been applied even against the claim of lack of funds by a trustee in bankruptcy.

Ingels v. *Boteler*, 100 F. (2d) 915 (C.C.A. 9th, 1938), aff'd 308 U.S., 57 (1939).

This section requires only that the taxes in question be applicable to a business conducted by a trustee appointed by an United States Court, and that if they are, the trustee is liable for their payment. Asuming that the real estate taxes owed the City of Boston were owed by the Old Colony and the Boston and Providence, the duties of operation of these roads have been placed upon the New Haven trustees (R., pp. 87, 112). Since operation by the New Haven trustees

must continue until abandonment is authorized by the Interstate Commerce Commission and since such abandonment has not been authorized, the New Haven trustees are conducting the business of the Boston and Providence and of the Old Colony and they are liable for the taxes properly assessed upon these businesses. That the operating profits of the lessor lines are insufficient to meet these taxes does not affect the obligation of the New Haven trustees to pay. As has been hereinbefore stated, the paramount purpose of Section 77 (c) (6) is, in the interest of the public, to prevent a discontinuance of service. The New Haven trustees, being under a duty to continue the business of operating the lessor lines, cannot avoid the payment of the taxes applicable to such business even if the operation results in a loss and makes it necessary for the New Haven to go into its coffers and be left with a claim against the lessors. Section 25 of the Massachusetts Act of 1896 provides that the real estate of The Boston Terminal Company required by that Act to be used by the railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies (R., p. 154), and the certificate of assessment by the City of Boston of The Boston Terminal Company's properties shows that this assessment is levied directly against the Boston and Albany Railroad and the New York, New Haven and Hartford Railroad Company, lessees of New England Railroad Company, Boston and Providence R. R. and Old Colony R. R. (R., p. 179). The real estate taxes having been legally assessed by the local authorities, the provisions of 28 U.S.C.A., Section 124a require that the New Haven trustees pay their share of the taxes so long as their use of the Boston Terminal facilities continues whether that use be direct or by the trustees as operators of the Old Colony and the Boston and Providence lines. That this share is seventy per cent. of the total tax we have demonstrated above in this brief at pages 39 and 40.

The petitioners, in their brief (pp. 22-29), discuss at some length the appointment of the trustees under Section 77 of the various railroads and, with considerable torturing of language, argue that operation of the lines of the Old Colony and the Boston and Providence by the trustees of the New Haven is not a conducting of the business of those lines by the New Haven trustees. If operating all the railroad trains that are operated over the lines of the Old Colony and the Boston and Providence by cars and engines bearing the name of the New Haven, the sale of tickets bearing the name of the New Haven and the carrying on of all of the other involved functions of the operation of a railroad does not constitute conducting the business of these railroads, the respondent is at a loss to know what their business is.

When the Congress in Section 124a provided that any trustee conducting any business shall be subject to all state and local taxes, it clearly meant a trustee actually carrying on the business which such bankrupt company was intended to carry on,—in this case, the operation of the lines of railroad. No prolonged quibbling concerning the meanings of "operate" and "conduct" can in any way obscure the plain intent of Congress that trustees actually carrying on and operating the bankrupt's affairs were to be responsible for state and local taxes applicable to that business operation. It is surprising that the petitioners attempt to draw this distinction between operating the lines and conducting the business of the former lessors; the order of the Judge of the United States District Court for the District of Connecticut specifically gave the trustees of the New Haven "the power to operate the business of Old Colony Railroad Company . . ." (R., pp. 86, 87).

The fallacy of the argument of the petitioners regarding the applicability of Section 124a is their assumption that property of one corporation in bankruptcy is being arbitrarily used to pay the taxes assessed to another bankrupt

corporation. This is not that case. Here, as has been pointed out, it is the New Haven trustees who are conducting the business of other bankrupts under a court order entered under the provisions of Section 77 (c) (6) of the Bankruptcy Act, and the New Haven trustees are therefore liable for the payment of local taxes applicable to such business. The cases of *Dulberg* v. *Zankel* and *The Interborough Rapid Transit Company*, cited on pages 24 and 25 of the petitioners' brief, are not in point, for this reason. The petitioners on page 26 of their brief seek the sympathy of this Court because of the extent of the advances made by the New Haven estate to the estates of the Old Colony and Boston and Providence and suggest that the Judge of the District Court properly exercised his discretion in not requiring the New Haven trustees to advance further funds for the accounts of the Old Colony and the Boston and Providence. It is not a matter in the discretion of a district court as to whether the specific mandate of Congress should or should not be obeyed. Many years ago, the New Haven entered upon certain lease obligations of its own free will. In view of these obligations and because of the public interest involved, even though the Congress permitted disaffirmance of the leases, the permission to disaffirm carried with it an obligation to continue operation in the interests of the public until abandonment of such operation was authorized with the approval of the Interstate Commerce Commission. As an incident of such operation the New Haven trustees are required by Section 124a to pay the taxes assessed upon the business which they operate. The decision in *In re Reorganization of Pittsburgh Rys. Co.* 111 F. (2d) 932 (C.C.A. 3d, 1940) does not conflict with the argument. (Certiorari was granted in this case and it is now Nos. 242 and 243, October Term, 1940 under the name of *Philadelphia Company* v. *Dipple et al.*) In the Pittsburgh Railway Company's case, "none of the taxes . . . were assessed against the debtor or its subsidiary, and none bears any relation to the properties

leased by the underliers to the debtor. Each is a tax upon the income of the underliers or upon their capital stock or securities." The only liability of the debtor to pay these taxes was contractual, and there was no question of operation of leased lines under the express provisions of a court order entered pursuant to Section 77 (c) (6) of the Bankruptcy Act. The distinction between the two cases is clear and fundamental. Whether or not in the *Pittsburgh Rys.* case the bankruptcy trustees were operating the business of certain underlying companies, it is clearly beyond doubt that, in the instant case, the New Haven trustees are conducting and operating the business of the Old Colony and the Boston and Providence, and doing so by virtue of Section 77 (c) (6). The Boston Terminal Company is in no sense an underlying company, and the obligation was imposed because of the Massachusetts Act of 1896 and not merely by private contract.

2. Section 124 requires the New Haven trustees to comply with the Massachusetts Act of 1896 and the order of the Department of Public Utilities thereunder by paying the prescribed expenses of the Boston Terminal.

28 U.S.C.A., Section 124 provides as follows: "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." A criminal penalty is also provided for violation of this statute. While it is true that the language of Section 124 differs from that of 124a in that "trustee" is not specifically mentioned, it is clear that even though this section uses only the words "receiver" or "manager" in possession

of any property, the Congress did not intend that trustees operating a business under the control of a Federal court should be exempt from the requirements of the valid laws of the state in which the property concerned is situated, even though they may technically be named trustees rather than receivers or managers.

Converse v. *Massachusetts*, 101 F. (2d) 48, 51 (C.C.A. 2d, 1939), aff'd 308 U.S. 79 (1939).

Palmer v. *Massachusetts*, 308 U.S. 79, 90, n. 17 (1939).

The Circuit Court of Appeals in its opinion in this proceeding states: "The statute speaks of a 'receiver or manager in possession of any property' and refers to the duty to 'manage and operate such property.' It cannot be gainsaid that the New Haven trustees are in possession, and managing and operating the properties, of the Old Colony and the Boston and Providence. The words 'receiver or manager' are broad enough to refer to any court officer performing these functions." (R., p. 195.)

While the respondent vigorously contends that the use of the Boston Terminal facilities is by the New Haven trustees themselves directly, nevertheless, even if we adopt the assumption that the New Haven trustees are using such facilities only through their operation of the lines of the Boston and Providence and the Old Colony under Section 77 (c) (6) it cannot be disputed that in one capacity or another the New Haven trustees are using the Boston Terminal and therefore bound by the provisions of Section 124 to comply with the Massachusetts Act of 1896. As has been previously pointed out, to the extent that this Massachusetts statute requires the railroads named by it to use the Boston Terminal and to pay for such use in the manner determined by the statute, it is undoubtedly a valid exercise of the police power of the Commonwealth (Brief of the respondent, p. 24).

As the Circuit Court of Appeals in this proceeding states: "Section 124 may not require compliance with any and all state laws, but it does require compliance with this particular Massachusetts statute. It is beyond question that state statutes relating to speed of trains, abandonment of lines, liability for negligence, the medium in which wages are paid, and other similar police regulations must be obeyed by the receivers of a railroad. *Erb* v. *Morasch*, 177 U.S. 584; *Pittsburgh & Shawmut Coal Co.* v. *Delaware & N. R. Co.*, D.C. N.D. N.Y., 289 F. 133; *Hornsby* v. *Eddy*, 8 Cir., 56 F. 461; *Pierce* v. *Van Dusen*, 6 Cir., 78 F. 693; *Converse* v. *Massachusetts, supra; Burke* v. *Morphy*, 2 Cir., 109 F. 2d 572. Compliance with these laws in no way interferes with the federal equity and bankruptcy powers upon which the reorganization of railroads is based." (R., p. 195.)

Until such time as the Massachusetts Act of 1896 has been amended or repealed it must be obeyed. As stated by the Circuit Court of Appeals, the record in this case presents no evidence that this law is invalid or the charges established by it unreasonable (R., p. 196).

The petitioners concede that Section 124 describes the New Haven trustees (Petitioners' brief, p. 34) but attempt to remove themselves from its express provisions, first upon the theory that the payment of compensation for the use of the Boston Terminal as prescribed by the Massachusetts Act of 1896 and the order of the Department of Public Utilities thereunder is not an expense indispensable to operation. Here the petitioners fall into the same error which apparently confused the judge of the District Court, as pointed out above, on page 37 of this brief. It is mandatory, by the terms of the Massachusetts Act, that the railroads named in that Act use the Boston Terminal for all of their terminal business. This use is an indispensable part of the operation by the New Haven under the provisions of

Section 77 (c) (6) of the lines of the Old Colony and the Boston and Providence. It is a necessary incident of this mandatory use of the terminal that the users pay the expenses expressly prescribed by Sections 10 and 25 of the Massachusetts Act. The only question of indispensability arises in considering whether there is an obligation to use the terminal, and the petitioners do not question the obligation of the railroads operated by the New Haven trustees to use the terminal. This having been established, compensation for such use must be paid and must be paid in accordance with the Massachusetts statute. It is not proper to describe certain elements of the statutory compensation for use as not indispensable and no issue of this sort is, in fact, raised by the instant case.

To reach the position taken by the petitioners, it is necessary for them to assume not only that a part of the statutory compensation for the use of the terminal is nonessential, but having made this assumption, they must further torture Section 77 (c) (6) into authorizing them to disregard the provisions of a valid state statute, if the costs imposed by that statute be considered by a district judge not to be indispensable to the operations under Section 77 (c) (6). Any such construction by implication is clearly unwarranted.

Palmer v. *Massachusetts*, 308 U.S. 79 (1939).

The second reason advanced by the petitioners to demonstrate that Section 124 does not require obedience to the Massachusetts Act of 1896 with respect both to use and to payment for that use is that to pay interest upon the Terminal Company's bonds would constitute a preference. In so arguing, the respondents treat the obligation to pay currently for current use as if the petitioners were being asked to pay a debt of the New Haven which arose prior to the bankruptcy. All of the items involved in the present case represent current charges,—prior charges have been

paid by the New Haven trustees (R., p. 188). The payment by the New Haven trustees for current use of the terminal facilities is no more a preference than the payment by the New Haven trustees of wages incurred in operating the lines of the Old Colony and the Boston and Providence, (*Burke* v. *Morphy*, 109 F. (2d) 572 [C.C.A. 2d, 1940]) of paying for repairs upon those roads or the payment of their office expenses. (In fact, the offices in Boston of the New Haven, the Old Colony and the Boston and Providence are upon the premises of the Boston Terminal and have been and are being used as such by the bankrupt companies.) The petitioners attempt to treat the payment of the expenses of the Terminal Company (including its bond interest and franchise taxes) just as though they were dealing with the interest upon bonds issued by the Old Colony or by the Boston and Providence. This argument of the petitioners may be sound with reference to such bonds but has no applicability whatsoever to the payment of compensation for the use of the Boston Terminal as prescribed by the Massachusetts Act of 1896.

H. THE INTERPRETATION MADE BY THE CIRCUIT COURT OF APPEALS OF SECTION 124 AND SECTION 124a TAKEN IN CONNECTION WITH SECTION 77 (c) (6) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petitioners argue that the Boston and Providence and the Old Colony are primarily responsible under the Massachusetts Act of 1896 for the compensation to be paid to The Boston Terminal Company for the use of the terminal facilities. Momentarily conceding that contention, the respondent replies that the New Haven trustees, as actual managers and policy determiners of the Old Colony and Boston and Providence, by virtue of Section 77 (c) (6) are responsible to the Terminal Company and to the City of

Boston for compensation for the use of the terminal facilities because Congress has so provided in 28 U.S.C.A., Sections 124 and 124a. As so interpreted, Sections 124 and 124a do not violate the Fifth Amendment to the Constitution of the United States.

The petitioners attempt to focus attention upon the alleged separation of the New Haven on the one hand and the Old Colony and the Boston and Providence on the other. To do this is violative of reality, inasmuch as it ignores the background of the present situation. It is imperative to understand that the Boston and Providence and the Old Colony are not, and have not been for over forty years, operating railroads. The New Haven brought about this situation by its own voluntary act. The lessors became component parts of the New Haven system by virtue of the lease taken by the New Haven. They continued to be component parts of the New Haven system. No separate accounts for the Boston and Providence and the Old Colony were kept by the New Haven prior to 1935 (R., p. 66). The Interstate Commerce Commission does not require separate accounts for the component portions of a railroad system.

> *New York, New Haven and Hartford Railroad Company Reorganization*, 224 I.C.C. 723, 724 (1938).

Accordingly, it was impossible to determine whether the Boston and Providence and the Old Colony were drags upon or valuable contributors to the system, so amalgamated was that system. Indeed, such an analysis of the component parts was not essential because the New Haven, by its own action, had created this integrated system by its lease of the Old Colony for ninety-nine years (R., p. 72).

After the New Haven bankruptcy and the subsequent rejection of the Old Colony and the Boston and Providence leases, there was nothing else that could be done except to have the former lessee continue to operate the lines of the

former lessors. If we "think things" instead of words, the dependence of the Old Colony and Boston and Providence upon the New Haven and the New Haven trustees is apparent, even after the so-called separation of the railroads by the lease rejections; the Boston and Providence and Old Colony, having been deprived by the New Haven of operating virility, had to rely on the New Haven trustees to operate the system as before the lease rejection, under Section 77 (c) (6). All that 28 U.S.C.A., Sections 124 and 124a added was that in continuing operation as before, the trustees of the lessee must abide by all valid state laws and continue to be obligated to pay state and local taxes, just as the lessee was before. Congress, in the exercise of its bankruptcy power, could have refused entirely to permit the lessee to reject leases. Relief from obligations is by legislative grace. Such grace may be extended subject to conditions, especially where the burden of the conditions is far less onerous than the burden from which escape is afforded. Congress may relieve some debtors and not others.

Campbell v. *Alleghany Corporation*, 75 F. (2d) 947, (C.C.A. 4th, 1935) *cert. denied*, 296 U.S. 581 (1935).

Congress may relieve from some debts without relieving from all debts. By Section 77 (c) (6), Congress has simply extended to the lessee the privilege to disaffirm its lease obligations, conditioned upon continued operation of the lessor lines by trustees if required by the court, and until abandonment is authorized by the Interstate Commerce Commission. 28 U.S.C.A., Sections 124 and 124a require such continued operation to be in conformity with valid state laws. Such a condition is clearly constitutional.

United States v. *Lowden*, 308 U.S. 225, 240 (1939).

Here Congress has merely recognized reality, by placing upon the lessee for a limited time the duty of continuing to

operate the lessor railroad, just as it had done before the lease rejection, not primarily for the benefit of the lessor but in the public interest. The petitioners' contention as to the unconstitutionality of this legislation is, in essence, a complaint that Congress did not completely relieve the debtor from the obligations which the debtor itself assumed to fulfill. Refusing to relieve a debtor of a fraction of its assumed obligations cannot, by sleight of word, be twisted into a constitutional deprivation of the debtor's property without due process of law.

Fort Smith Light and Traction Co. v. *Bourland*, 267 U.S. 330 (1925).

The legislative mandate requiring the lessee temporarily, and in the interests of the public, to fulfill its self-imposed obligation to operate the lessor lines in accordance with law raises no question of reasonableness or unreasonableness. Nevertheless if this issue were relevant it is clear that such a mandate cannot be deemed unreasonable. The situation here presents far less ground for complaint than the situation where a railroad is ordered to do at a loss that which it bound itself to do by its own charter.

Missouri Pacific Ry. v. *Kansas*, 216 U.S. 262, 279 (1910).

Colorado v. *United States*, 271 U.S. 153, 161 (1926).

In the present case the trustees of the New Haven pay less than if the original obligation were enforced.

Here, just as in *Dayton-Goose Creek Rwy.* v. *United States*, 263 U.S. 456 (1924), which case upheld the recapture of earnings provision of the Transportation Act of 1920, it is not a constitutional violation for Congress to route railroads receipts into the channels deemed by it to assure

an adequate and efficient transportation system. As in the *Dayton-Goose Creek* case, the contention here that the petitioners' earnings would be used to pay another's obligations glosses over the fact that the earnings are attributable not to any *one* railroad but to a railroad *system*. Section 77 (c) (6), in conjunction with Sections 124 and 124a, sensibly enunciates a policy of applying system earnings to system obligations which in the instant case are current charges of operation, even after the unscrambling of the system by the lease rejections, which unscrambling is a legal concept and not a fact; actually, here, the system continued to exist and still does exist.

Furthermore, the operation of the leased lines in conformity with valid state law, exactly as has been done for more than forty years, is only a temporary requirement by Section 77 (c) (6) and is proper in order to protect the interest of the public against sudden and unwarranted cessation of service. The requirement that the lessee operate the lessor lines is merely incident to the reorganization of the lessee. Legislation of a temporary nature in the interest of the public may well be justified, even though it could not be upheld as a permanent measure.

Block v. *Hirsh*, 256 U.S. 135, 157 (1921).

Section 77 (c) (6) specifically states that the lessor lines may be abandoned by the lessee, with the consent of the Interstate Commerce Commission. Significantly, the abandonment of the Boston and Providence would deprive the New Haven of its sole entrance to Boston through Providence as a part of its main shore line route. Again, the obligation to operate the lessor lines exists only so long as these lines are incapable of self-operation. Finally, even if the obligation to operate the lessor lines continues, the

lessee in such operation may not be obliged to obey certain state laws if and when such laws are abrogated in a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the court under Sections 77 (d) and 77 (f) of the Bankruptcy Act.

The petitioners on page 45 of their brief draw a rather obvious red herring across the trail when they argue that the solution of all of the problems presented in this case is the reorganization of the Terminal Company. Very obviously the petitioners do not want to abandon the use of the Boston Terminal. Their hope is to continue the use of the Terminal without paying the statutory compensation for its use. As the respondent has pointed out in this section the obligations imposed by Section 77 (c) (6) and by Sections 124 and 124a are clearly justifiable both because they are a condition to other relief sought by the debtor and because they are necessarily impermanent in their nature. It is reasonably clear that the approval by the Interstate Commerce Commission of a plan of reorganization of the New Haven and the carrying out of such a plan under the direction of the District Court would remove from the petitioners the burdens properly imposed upon them by Section 77 (c) (6) and Sections 124 and 124a. In the meantime the petitioners cannot avoid the obligations imposed upon them by Federal and State statutes by complaining that The Boston Terminal Company should be reorganized. That sort of complaint is putting the cart before the horse.

The statements made by the petitioners with reference to the initiation of a reorganization plan of the Terminal Company fail to present the complete facts. The reason for the statements of the petitioners is apparently to minimize the importance of the instant case.

On the petition of the petitioning creditors and later of

the Terminal Company, Judge Ford of the United States District Court for the District of Massachusetts has twice extended the time within which the Debtor may file a plan of reorganization. Therefore no plan of reorganization has been filed by the Debtor. The only plan of reorganization filed anywhere was filed by the Trustees in Bankruptcy of Old Colony Railroad Company—they being the same individuals as the trustees of the New Haven. The sub-joined footnote explains the present status of this plan.[13]

In short, it is not unconstitutional for Congress to require a railroad, temporarily, in the interest of the public service to continue to do that which it agreed to do and has been doing for many years. There is no constitutional principle requiring Congress to relieve bankrupts from all their obligations, especially those self-imposed.

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[13] On May 3, 1940, pending the return of an Order of Notice issued by the District Court for the District of Massachusetts on a petition by creditors of the Terminal Company to extend the time for filing the debtors' plan of reorganization in the District Court and to enjoin the filing of the debtors' plan during the extension, and after the Judge of the District Court had personally informed counsel for the Old Colony and New Haven trustees that no plan should be filed until after hearing on the said petition, the trustees of the Old Colony (who are the identical individuals who are the trustees of the New Haven) filed in the District Court of Massachusetts a plan of reorganization as stockholders of the Terminal Company and on the same day filed a copy of the plan with the Interstate Commerce Commission. On May 6, 1940, which was the return date of the said Order of Notice, the District Court after hearing, extended the time for filing the debtors' plan of reorganization until further order of the court. On the same day, on petition of the present respondent, after notice to the trustees of the Old Colony (and of the New Haven) as well as to other parties in interest, and after hearing, the District Court ordered the plan filed by the trustees of the Old Colony to be struck from the files of the Court as not properly filed therein under the provisions of Section 77 of the Bankruptcy Act and the General Orders in Bankruptcy promulgated by this Court. The trustees of the Old Colony acquiesced in this order but later requested the Interstate Commerce Commission to forward to the District Court for the District of Massachusetts a copy of the plan as filed with the Interstate Commerce Commission on May 3rd. After some delay, this request was complied with but the Clerk of the District Court in Massachusetts, on advice of the Court, refused to accept such copy for filing on the ground that in the circumstances no plan was properly pending before the Interstate Commerce Commission. Just prior to the expiration of the first extension a second extension was granted by the Court upon application of the debtor as well as of its creditors in order to await the decision of this Court.

VII.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed and that Order No. 398 of the District Court for the District of Connecticut should be reversed.

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APPENDIX.

MATERIAL PROVISIONS OF THE STATUTES.

UNITED STATES STATUTES.

Transportation Act of 1940, Section 3 (5):

"If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

MASSACHUSETTS STATUTES.

Massachusetts Acts and Resolves of 1896, Chapter 516, sections 1 to 8 inclusive:

"SECTION 1. Charles F. Choate, William Bliss, William T. Hart, Royal C. Taft, and Charles P. Clark, their associates and successors, are hereby make a corporation by the name of The Boston Terminal Company, with power to construct and maintain a union passenger station in the southerly part of the city of Boston, and to provide and operate adequate terminal facilities for the several railroad companies hereinafter authorized to hold the stock of said terminal company, and for the accommodation of the public in connection therewith.

"SECTION 2. The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

"SECTION 3. The immediate government and direction of the affairs of said terminal company shall be vested in a board of five trustees, to be appointed at once on the organization of said company, one of whom shall be appointed by each of said railroad corporations from its directors, to hold office as such trustee at the pleasure of the corporation by whom he is so appointed; any vacancy to be filled in like manner. The trustees shall elect one of their number to be chairman, and may elect another to be vice chairman, and

shall choose a clerk who shall be sworn, and a treasurer who shall give bond in the sum required by the by-laws, with surety, for the faithful discharge of his duties."

"SECTION 4. Said terminal company, to provide means to carry out the purposes of this act, may from time to time issue coupon or registered bonds, in sums of not less than one hundred dollars each, payable at periods not exceeding one hundred years from the date thereof, bearing interest not exceeding four per cent. per annum, payable annually, semi-annually, or quarterly to such an amount as may be necessary and as may be approved by the board of railroad commissioners. No bonds shall be issued unless approved in writing by at least three of the trustees of the corporation. Said corporation may mortgage or pledge as security for the payment of such bonds or of any bonds given in renewal thereof, a part or all of its real estate and other property. In case any mortgage made to secure bonds issued by the terminal company under the provisions of this act shall be foreclosed, and there shall not be thereby realized a sum sufficient to pay all the then outstanding bonds secured by said mortgage, said railroad companies shall be held liable to pay any deficiency in the amount required to pay all of said bonds and the interest thereon in such proportions as may be just and equitable, having regard to the use which they or their lessees may have respectively had of the mortgaged property; and the supreme judicial court shall have jurisdiction in equity to determine such proportions and to compel such payments to be made, so that the full payment of the principal and interest of bonds issued under the provisions of this act by the terminal company shall not in any event fail. Any such mortgage shall be made to a trustee or trustees approved in writing by the board of savings banks commissioners, and savings banks and institutions for savings may invest in such bonds when so secured.

"SECTION 5. Said terminal company may purchase or otherwise take in fee the whole or any part of the land in the city of Boston within the following limits, that is to say:—Beginning at the easterly corner of Atlantic avenue and a way called Summer street, thence bounded by the northerly line of said way extended to Fort Point channel; thence by said channel to Broadway; thence by Broadway to the westerly line of Lehigh street; thence by the westerly line of Lehigh street and by South street, Kneeland street and the westerly line of (street extended to Federal street; thence by the westerly of Federal street to Summer street, and thence across public ways to the point of beginning; and may discontinue and occupy for its purposes all streets and rights of way embraced within the land so acquired: *provided, however,* that no land belonging to the Boston and Albany Railroad Company or to the Old Colony Railroad Company shall be taken by said terminal company without the consent of the directors of both of said railroad companies; and *provided, further,* that the portion of Federal street to be discontinued under the provisions of this act shall not be closed to travel prior to the completion of the extension of Summer street and the extension of Dorchester avenue hereinafter provided for, and the opening of the same to travel, unless a temporary provision for travel over such portion of Federal street, so that the travel shall not be interrupted, is provided for in some manner approved by the mayor, such temporary accommodation to continue until the completion of said Dorchester avenue and Summer street, and *provided, further,* that if said terminal company shall take for the purpose of this act any part of the land within the limits before described, owned by the Boston Gas Light Company, it shall take the whole of the land owned by said Boston Gas Light Company within said limits.

"SECTION 6. Said terminal company, upon the passage of this act, shall forthwith organize, and thereupon the trus-

tees thereof shall at once prepare plans and specifications for the construction of a union passenger station upon land herein-above authorized to be taken, adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the companies and of the public, exhibiting its form, dimensions of walls, rooms and partitions, and arrangements, and its location with reference to the adjacent streets and to the tracks of all said railroad companies located or proposed to be located in the vicinity thereof, and any projections over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval, who shall forthwith approve or disapprove them in writing. The trustees shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require. Said station shall be constructed by the terminal company according to the plans thus approved by the board of railroad commissioners, or as the same may be changed, as hereinafter provided. The supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce the provisions of this section.

"Section 7. Said terminal company, within three months after the plans of said union station are approved as above-provided, shall file in the registry of deeds for the county of Suffolk a location of the lands hereby authorized to be taken by it, or of such part thereof as it then deems it necessary to acquire, and shall proceed with all reasonable diligence to the construction and completion of such union passenger station according to said plans. But the trustees of the terminal company may from time to time propose to the mayor

of Boston any changes in said plans, and the mayor shall forthwith approve or disapprove such changes in writing, and the trustees shall then at once submit such changes to the board of railroad commissioners, who, after notice to the mayor and to the railroad companies, and a hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require.

"SECTION 8. Said terminal company, upon the completion of said union passenger station and grounds, shall make reasonable rules and regulations for their use; and the board of railroad commissioners, upon the application of either of said companies or of the mayor of the city of Boston, and hearing may, from time to time, make any modification of such rules and regulations which they may deem just and reasonable. Such rules and regulations shall be binding upon all corporations and persons in the use of said station and grounds, and shall be enforced by railroad police officers who may be appointed upon the application of the terminal company, in the same manner and with the same powers in said station and grounds, and with like liability of the terminal company for their acts, as railroad police officers under the general law."

Massachusetts Acts and Resolves of 1921, Chapter 363:

"SECTION 1. Section two of chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six is hereby amended by inserting after the word "Company", in the third line, the words:—its lessee, the New York Central Railroad Company,—and also by inserting after the word "for", in the eighth line, the words:—or purchase,—so as to read as follows:—*Section 2.* The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, its lessee, the New York Central Railroad Company, the New England Rail-

road Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for or purchase and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

"SECTION 2. During the existence of the lease of the Boston and Albany Railroad to the New York Central Railroad Company authorized by chapter four hundred and sixty eight of the acts of nineteen hundred, the New York Central Railroad Company shall exercise all the powers conferred upon the Boston and Albany Railroad Company under the provisions of said chapter five hundred and sixteen of the acts of eighteen hundred and ninety six, as amended

General Laws of Massachusetts (Tercentenary Edition), Chapter 160:

"SECTION 128. A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station, unless it is relocated under the following section, nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon.

"SECTION 129. A railroad corporation may relocate passenger stations and freight depots, with the written approval of the department and of the board of aldermen of the city or the selectmen of the town where such stations or depots are situated."

Massachusetts Acts and Resolves of 1901, Chapter 330:

"SECTION 1. All general laws defining the powers and duties of the board of railroad commissioners in reference to the stations and premises of railroad companies, and to the operation of trains in connection therewith, shall, except as otherwise provided in chapter five hundred and sixteen of the acts of the year eighteen hundred and ninety-six, be applicable to the station and premises of the Boston Terminal Company, and to the operation of trains in connection therewith.

"SECTION 2. This act shall take effect upon its passage."

Order of the Department of Public Utilities of the Commonwealth of Massachusetts, dated July 17, 1931.

"(D.P.U. 4099) Petition of The New York, New Haven and Hartford Railroad Company that the Department determine the proportions in which the New York Central Railroad Company, lessee of the Boston and Albany Railroad, and The New York, New Haven and Hartford Railroad Company have the use of the Union station of The Boston Terminal Company in the city of Boston.

"Under the provisions of section 10 of chapter 516 of the Acts of 1896, the railroad companies required to use the South union station shall pay to the terminal company, for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of the act as the same shall become payable, and a dividend, not to exceed

four per cent per annum, upon its capital stock. Each of the railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of the railroad companies, and, in case they fail to agree, the Board of Railroad Commissioners, of which this Department is the successor, shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Such proportions as thus fixed, either by agreement or by determination, may be revised and altered from time to time in like manner at intervals of not less than three years. The decisions of the Board of Railroad Commissioners, and its successors, fixing said proportions of payments, shall be final and binding upon the railroad companies.

"The petitioner in this case is one of the original railroad companies required to use the said union station. In addition, it is successor to the New England Railroad Company and is lessee of the Old Colony Railroad and of the Boston and Providence Railroad. In 1922, the said proportions of use were fixed by agreement, the petitioner's being 72 per cent and the New York Central Railroad Company, as lessee of the Boston and Albany, being 28 per cent.

"These proportions have remained without revision or alteration since that time, but the parties have agreed to their revision, to be effective as of January 1, 1930. They have not, however, been able to agree upon the proportions in which each company has the use of the stations and facilities, and this petition is for this Department to determine such proportions under the provisions of said section 10, chapter 516, Acts of 1896.

"The original agreement (1899) provided that the proportions be fixed upon a basis of six factors. In 1902, two of these were eliminated, and the agreement of 1922 was based on the four factors of number of passengers, number of

tickets sold, number of trains handled, number of pieces of baggage handled.

"At the hearing, petitioner's counsel contended that the fairest method of determining the proportion of use was on the basis of car and engine entrances, similar to that in use at Grand Central Terminal, New York, although it was conceded it should be limited to 'live' cars and not empty draughts, so-called, in view of the difference in handling draughts by the two roads. This would be in substitution of the factor of number of trains handled, heretofore used.

"The petitioner further contended that, if this method did not meet with the approval of the Department, there should be a separation of the facilities between strictly passenger station building and track facilities covering operation and handling of trains as a terminal railroad. It was further suggested that the station building should be separated into passenger station facilities and baggage room facilities, including mail and express. The factor of tickets sold or number of passengers, or both, would be used as the basis of the passenger station expenses, except that part of the station used for handling baggage, mail and express. The factor of cars and engines handled would be used as the basis of yard and track expenses.

"It was further argued by the petitioner that if the latter method were adopted the proportion of use should be based on a weighted average, rather than by adding together the proportions of the factors used and dividing by the number of factors.

"We are of the opinion that two of the factors used in the past can be eliminated with fairness to both parties and in the interest of simplicity.

"The number of passengers using the station would seem to be a better indication of the use of the station than the number of tickets sold, since many persons use the station regularly who buy their tickets elsewhere.

"The amount of baggage handled, also, would seem to be adequately covered both by number of passengers and number of cars. If baggage were included logically mail and express should also be included, and the difficulties involved in making accurate counts would be out of all proportion to the effect, if any, they would have on the more important factors. This would be particularly true if weighted averages were used. This leaves the two factors of car and engine entrances and the number of passengers as factors.

"While it is probably true that the number of car and engine entrances is the sole factor in the majority of terminal stations of Class A railroads in the country, we think that number of passengers is an important factor, and should be given consideration.

"Determining, therefore, these two factors, of number of passengers and number of 'live' car and engine entrances, as the ones to be considered in this case, the next question arises as to whether the proportion of use should be determined by adding the two proportions of these factors together and dividing by two, or whether the relative proportion of the number of passengers as between the two railroads should be allocated to the passenger station building and the number of 'live' cars and engine entrances should be allocated to the yard and track facilities and a weighted average of the two factors taken as a basis for a proper proportion of the use.

"From the evidence submitted, the proportion as between the two roads with respect to the number of passengers would appear to be New Haven 73%, Boston and Albany 27%. With respect to the number of live cars and engine entrances, it would appear to be New Haven 67%, Boston and Albany 33%. Adding these two together and dividing by two, we have a proportion of use of New Haven 70%, Boston and Albany 30%.

"Applying a weighted average on the basis of the original cost of the passenger station and the yard and track facilities according to allocations submitted in evidence by the New Haven Railroad and disputed by the Boston and Albany Railroad, the proportion of use would be New Haven 69% and Boston and Albany 31%.

"If applied on the basis of expenses allocated to the passenger station and the yard and track facilities according to such evidence, it would be approximately the same proportions, slightly over 69% for the New Haven and slightly less than 31% for the Albany.

"While there is much to be said for the theory that the number of passengers' use should be allocated to the passenger station and the number of car and engine entrances' use should be allocated to the yard and track facilities, and it may well be more logical to thus deal with it, can be also argued that after all it is a single unit of property and the various kinds of use are more or less interlocked. Having in mind the possible one per cent difference in result in applying the two methods, there is an additional factor to be considered. In the evidence submitted as to number of passengers averaged over a period of three years, the counts included passengers getting on and off at Back Bay station and passengers getting off at Huntington Avenue and getting on at Trinity Place stations. If the counts had been confined to passengers using the South Station exclusively, as we believe it should, particularly if the weighted average method is used, there would without question be a change in the percentages favoring the Boston and Albany. We are of the opinion that this change would offset this one per cent difference as between the two methods.

"Bearing in mind this fact, we do not believe the result to be obtained by attempting an allocation as between the station and the yard and track facilities either on the basis of

original cost or of expenses would justify the cost or warrant the time required for such purpose.

"In fact, with such a slight probability of any material change being accomplished by such an allocation, it would seem rather impracticable to become involved in all manner of disputes as to whether certain items should be credited to the station or the yard, and, if recognized as elements in both, the proper prorating as between the two. Hence we have disregarded the use of the weighted average at this time.

"It was suggested by the petitioner that the Department could, under the statute, set up a formula by the use of certain factors whereby the railroad companies should pay the Terminal Company such sums as might be determined at stated times. Even if that be true, we do not believe it should be done in this case, in view of the difficulty in making accurate counts from time to time as was indicated by some of the evidence submitted at the hearing, the cost thereof, and the further fact that since this decision is retroactive to January 1, 1930, application may be made by either party for a revision and alteration of the proportions within a year and a half if conditions should materially change.

"Certain requests for rulings of law were made by both parties. We deny all of said requests except to the extent they have been granted in the decision, with the exception of numbers 1, 3, 6, and 7 of the New York, New Haven and Hartford Railroad Company's requests, and numbers 1, 4 and 5 of the Boston and Albany Railroad Company's requests, which are granted in so far as they may be material.

"Accordingly, after public hearings, the Department

"DETERMINES that the proportions of use of the South Union Station and facilities be fixed at seventy per cent (70%) of use by The New York, New Haven and Hartford Railroad Company and thirty per cent (30%) of use by the

New York Central Railroad Company, lessee of the Boston and Albany Railroad.

By order of the Department

(signed) ALLAN BROOKS,
Administrative Secretary.

Commissioners participating in the above decision (D.P.U. 4099) were:

Chairman Atwill
Commr. Stone
" Hardy
" Wells
" Goldberg"

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 120

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE CITY OF BOSTON AS AMICUS CURIAE

ROBERT H. HOPKINS,
Assistant Corporation Counsel

CITY OF BOSTON PRINTING DEPARTMENT

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IN THE

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OCTOBER TERM, 1940

No. 120

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE CITY OF BOSTON AS AMICUS CURIAE

OPINIONS BELOW

The District Court for the District of Connecticut, on October 30, 1939, filed a "Memorandum of Decision on Petition for Order No. 398" which is not reported but is printed in the Record at pages 12–19. The opinion of the Circuit Court of Appeals, dated April 16, 1940, is reported at 111 F. 2d 215, sub. nom. *Webster and Atlas National Bank of Boston* v. *Palmer* and is printed in the Record at pages 185–196.

JURISDICTION

The order of the District Court, entitled "Order No. 398", was dated October 30, 1939 (R. 20). The decree of the Circuit Court of Appeals, reversing the District Court's order, was contained in an Order for Mandate filed May 16, 1940 (R. 197–198). A petition for a writ of certiorari was filed in this Court on June 1, 1940, and was granted on October 14, 1940 (R. 200). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code (28 U. S. C. § 347 (a)).

STATEMENT OF THE CASE

The order of the District Court which the Circuit Court of Appeals reversed was called "Order No. 398" (R. 20) and was rendered in proceedings under Section 77 of the Bankruptcy Act (11 U. S. C. § 205) for the reorganization of The New York, New Haven and Hartford Railroad Company (hereafter called the "New Haven"). The order, which was made upon a petition (R. 4) of these petitioners (hereafter called the "New Haven Trustees"), directed them as such Trustees to withhold payment of 1939 real estate taxes of the City of Boston, currently assessed and payable, upon the property of the Old Colony Railroad Company, the Boston and Providence Railroad Corporation and The Boston Terminal Company, and also to withhold payment of certain franchise taxes assessed against, and bond interest of, The Boston Terminal Company (R. 6). The trustee of the first mortgage bonds of The Boston Terminal Company appealed from this order (R. 80), and this appeal was thereafter carried on by the successor trustee, Webster and Atlas National Bank of Boston, the present respondent. Although counsel for the City of Boston was

present at the hearing held before the issuance of Order No. 398 (R. 24), this was not pursuant to the notice ordered to be given to parties (R. 11), which was not served on the City of Boston, and the City of Boston had not intervened and was not otherwise a party to the reorganization proceedings. Because of the interest of the City of Boston in Order No. 398 so far as it affected the payment of real estate taxes of the City, counsel for the City filed a brief as *amici curiæ*, by leave, in the Circuit Court of Appeals (R. 186). The position of the City is still the same, and it appears here as *amicus curiæ* for the same reason.

On October 23, 1935, The New York, New Haven and Hartford Railroad Company filed in the United States District Court for the District of Connecticut a petition (R. 44), which was approved the same day (R. 44–53), for reorganization under § 77 of the Bankruptcy Act (11 U. S. C. § 205), and those proceedings are still pending in that Court. On November 8, 1935, that Court appointed as Trustees of the Debtor's property Howard S. Palmer (president of the Debtor), W. M. Daniels, and James Lee Loomis (R. 53–56). On February 24, 1937, W. M. Daniels was relieved of his trusteeship (R. 94) and on March 10, 1937, Henry B. Sawyer was appointed in his place as a Trustee (R. 94). These men have continued as Trustees of the property of the principal Debtor since that time.

On June 2, 1936, the Old Colony Railroad filed in the same court a petition (R. 67) under Section 77 for reorganization in the same proceedings as those for reorganization of the New Haven. This petition had annexed to it a copy of a lease by the Old Colony to the New Haven for a term of ninety-nine years from March 1, 1893 (R. 72). The petition alleged that the lines of railroad owned or leased by the Old Colony formed an important part of the system of

the New Haven (R. 67); that since their qualification the New Haven Trustees had continued to conduct carrier operations over these lines (R. 68); that on June 1, 1936, the New Haven Trustees gave formal notice of their disaffirmance of the lease (R. 68); and that the problems of operation and administration of the property of the New Haven and the Old Colony were so interrelated that the interests of the Old Colony and its security holders would be best conserved by the continuance of unified operation by the New Haven Trustees (R. 70). On the next day, June 3, 1936, the court, by Order No. 74 (R. 81), approved this petition and ordered that until further order the New Haven Trustees continue to possess and to operate the property of the Old Colony, such operation to be for the account of the Old Colony.

On June 18, 1936, the court, by Order No. 75 (R. 85), appointed the same men who were the Trustees of the property of the New Haven to be Trustees of the property of the Old Colony, it being specifically recited in that order as the court's opinion "that the appointment of trustees herein should not disturb the continuity of operations of the railroad system of The New York, New Haven and Hartford Railroad Company as at present carried on by the trustees of that corporation and that the appointment of the Trustees of The New York New Haven and Hartford Railroad Company would best serve the interests of all parties in interest" (R. 85). In addition, that order recited that inasmuch as the public interest and the interests of the Old Colony and the New Haven required that until further order the railroad lines and property of the Old Colony be operated as an integral part of the system of railroads then being administered by the New Haven Trustees, it was ordered that "said trustees of The New

York, New Haven and Hartford Railroad Company, as such, be and they hereby are directed to continue to possess and operate the properties of Old Colony Railroad Company, such operation to be for the account of Old Colony Railroad Company or the Trustees of its property" (R. 87). The order gave the New Haven Trustees the power, among other things, "to operate, maintain and repair the railroad and properties" of the Old Colony (R. 87); to collect "the accounts, revenues, income, rents, profits, and tolls accrued from its railroads and properties" (R. 87); and from time to time until further order of the court to pay "all taxes and assessments due or to become due upon the properties, income, franchises, or business" of the Old Colony (R. 88), and "all necessary current expenses of every description in operating the railroads and property, preserving the assets and conducting the business" of the Old Colony (R. 88). The New Haven Trustees were further authorized, "in connection with their operation of the said railroad lines and property of the Old Colony Railroad Company as a part of the system of lines and properties heretofore operated by them," to mingle the funds, income, assets and equipment of the properties, and, except as otherwise expressly ordered by the court and pending its further order, for the purposes of operation only, "to deal with all the property subject to their control as a single railroad system" (R. 89). By paragraph 7 that order expressly directed the New Haven Trustees to pay the quarterly installment of Federal income taxes of the Old Colony due June 15, 1936 (R. 90).

By a lease dated April 7, 1888 (R. 129–143), the Boston and Providence Railroad Corporation had leased all its property to the Old Colony Railroad Company for a term of ninety-nine years. By Order No. 217, dated July 19, 1938 (R. 110), the same court ordered the trustees of the property

of Old Colony Railroad Company (hereafter called the Old Colony Trustees) to disaffirm and reject this lease forthwith; and those trustees did so (R. 113). The court also ordered the operation of the property of the Boston and Providence for the account of that corporation to be continued pursuant to Section 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6)), and "since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate" (R. 112).

On August 4, 1938, shortly after the disaffirmance of the Boston and Providence lease to the Old Colony pursuant to Order No. 217 of the District Court for the District of Connecticut, a petition was filed in the United States District Court for the District of Massachusetts (R. 124) for the reorganization under Section 77 of the Boston and Providence. This petition recited, among other things, that the Boston and Providence lease to the Old Colony had been rejected and that the United States District Court for the District of Connecticut had ordered the operation of the property of the Boston and Providence to be continued by the New Haven Trustees for the account of the Boston and Providence (R. 125). On the next day this petition was approved (R. 126), and those reorganization proceedings are still pending in the District Court for the District of Massachusetts. Although separate trustees were later appointed by the Massachusetts District Court for the Boston and Providence properties, the operation of the Boston and Providence properties by the New Haven Trus-

tees pursuant to Order No. 217 of the Connecticut District Court (R. 112) has continued. The continuance of this operation is shown by the report of the New Haven Trustees (R. 144, at 147), the petition for Order No. 398 (R. 4, at 5), and also by statements in a brief of the New Haven Trustees (R. 177, 178).

In addition to the real property in the City of Boston owned by the Old Colony and the Boston and Providence upon which the City of Boston assesses taxes (R. 6), these railroads, together with the New Haven and the Boston and Albany Railroad Company, have had imposed upon them by a Massachusetts statute certain obligations in regard to real estate taxes of Boston, franchise taxes, bond interest, and operating expenses, of The Boston Terminal Company, which owns and operates the South Terminal Station in Boston. Chapter 516 of the Special Acts of Massachusetts of 1896 (quoted in part, R. 7–9, 154; quoted in full, *infra*, 48) establishes a corporation by the name of "The Boston Terminal Company" for the purpose of providing and operating terminal facilities in Boston "for the several railroad companies hereinafter authorized to hold the stock of said Terminal Company", and the companies which are named include the Boston and Albany, the Boston and Providence, the Old Colony, and the New Haven. Section 9 of that act (R. 8, *infra*, 53) provides that "All said railroad companies upon the completion of said station shall use the same, * * *". Section 10 (R. 8, *infra*, 53) provides that the companies required to use the union station shall pay to the Terminal Company for such use the amounts necessary to pay the expenses of its corporate administration, the maintenance and operation of the station and its facilities, all taxes and assessments which may be required to be paid by the Terminal Company, the interest upon its bonds, and a

dividend upon its stock, in proportion to the use which each one makes of the station and its facilities. Section 10 further provides that the proportion of the use shall be fixed by written agreement, or, if the companies are unable to agree, by the department which is now the Massachusetts Department of Public Utilities. Section 25 (R. 154, *infra*, 53) first refers to a franchise tax to Massachusetts upon the value of the capital stock of the Terminal Company, and then provides that "its real estate required by this act to be used by said railroad companies shall be assessed to and the tax thereon shall be paid by said railroad companies, * * *".

As of January 1, 1939, the City of Boston assessed real estate taxes upon the property of The Boston Terminal Company in the amount of $638,400 to the Boston and Albany Railroad Company, Boston and Providence Railroad Corporation, Old Colony Railroad Company, and The New York, New Haven and Hartford Railroad Company (R. 179), pursuant to the requirements of Section 25 of the Massachusetts Act of 1896. (No issue was raised in the courts below as to the form of the assessment. Re-assessment correcting inaccuracies was made on December 20, 1939, but that fact does not, of course, appear in this Record.) Taxes of the City of Boston and other cities and towns in Massachusetts and Rhode Island were also assessed on the other property of the Old Colony and Boston and Providence (R. 6). By the provisions of the General Laws of Massachusetts (Tercentenary Edition), c. 59, § 57, interest from October first commences to run on all taxes remaining unpaid after November first. On October 17, 1939, the New Haven Trustees filed the petition (R. 4) which is the basis of Order No. 398. In that petition they set out the imminence of payments for the taxes just described and also

for bond interest and Massachusetts franchise taxes, due November 1, 1939, of The Boston Terminal Company (R. 6). As to the taxes and bond interest of The Boston Terminal Company, the petitioners stated that a "proportion" would be payable "for the account of Old Colony and Boston and Providence estates" (R. 6). This "proportion" was stated to be 70 per cent (R. 6), and the method of calculating it was described in the petition as being the necessary result of the proportion of use determined under Section 10 of the Massachusetts Act of 1896 (R. 7–10). The City of Boston did not fix or agree to and does not now agree to this "proportion" of 70 per cent, but assessed the entire tax upon the Terminal Company property without apportionment; but as the remaining 30 per cent of the tax was paid by the Boston and Albany no issue on that point was raised in the courts below and does not appear to be present in this Court. In Paragraphs 7 and 8 of that petition (R. 10) the petitioners said in part that they were of the opinion "that they should make no further advances to or for the Old Colony and Boston and Providence estates which are not essential in operating the lines of railroad of Old Colony and Boston and Providence as directed by the Court pursuant to the provisions of Section 77 of the Bankruptcy Act"; that payment by the petitioners of these items of bond interest and taxes was "not essential, in the opinion of petitioners, to their operation of the lines of railroad in the estates of Old Colony and Boston and Providence" (R. 10); and that nonpayment of those items "would leave with the present creditors, viz., the taxing authorities and The Boston Terminal Company, their claims against the Old Colony and Boston and Providence estates instead of transferring those claims to petitioners" (R. 10); and they asked that the Court direct them as to whether or not

they should make advances for the payment of those items (R. 11). On October 30, 1939, the judge of the District Court, by Order No. 398 (R. 20), granted the petition and ordered the New Haven Trustees to "withhold the payments listed in Paragraphs 4 and 5 of said petition." This order was accompanied by a memorandum (R. 12–19) in which he gave his reasons.

QUESTIONS PRESENTED

The two main questions raised by Order No. 398 seem to be the following:

(1) Did the District Court have power to make any order of this kind?

(2) Was the order made by the District Court so clearly wrong that it should be reversed?

Matters included in the arguments of counsel on the foregoing issues, although they must be considered by the Court, do not seem to be properly described as "questions." Among these matters will be the various federal and state statutes such as Section 65 of the Judicial Code (28 U. S. C. § 124); the Act of June 19, 1934, 48 Stat. 993 (28 U. S. C. § 124a); Section 24 (1) of the Judicial Code (28 U. S. C. § 41 (1)); the various statutes of Massachusetts pertaining to the assessment and collection of local taxes (G. L. Chapters 58A, 59, 60); and the specific provisions of the Massachusetts Special Act of 1896, Chapter 516, §§ 10 and 25; all of which the City of Boston cites as authorities in support of its contention that Order No. 398 was properly reversed, but does not regard as questions presented for decision by the Court. On the other hand, the petitioners' prediction as to the practical effect on the New Haven estate if the New Haven Trustees should use the funds of that estate to pay the taxes and bond interest does not seem to be a

"question," but merely an argument, which the City of Boston contends is not relevant to this issue.

The City of Boston, as *amicus curiæ*, contends that the answers to the two main questions stated above should be:

(1) The District Court did not have power to make Order No. 398; and

(2) Order No. 398 was so clearly wrong that it requires reversal.

SUMMARY OF THE ARGUMENT

As to the power of the District Court to make such an order as Order No. 398, it is the contention of the City of Boston that on this application the District Court did not have power to relieve the petitioners from the necessity of paying taxes and bond interest required by the provisions of local laws. It is not necessary to determine now whether, upon application by the Commonwealth of Massachusetts, the City of Boston or other cities, or the bondholders of The Boston Terminal Company, to compel the New Haven Trustees to make the described payments, the Connecticut District Court would have had power to determine the validity, amounts, and proportions, of those payments, or to deny such an application, because Order No. 398 was not given pursuant to any such application. It was, instead, an application by trustees, appointed by the District Court to conduct a business, to be instructed that they need not comply with certain requirements of state and local laws in regard to that business, before any attempt was made by the authorities of that state to enforce those laws. It is the contention of the City of Boston that Order No. 398 was an improper attempt to make a declaratory adjudication of the rights of the City of Boston against these Trustees and that it is neither binding on the City of Boston nor a

protection to the New Haven Trustees from the consequences of their failure to make the required payments; but that as its practical effect is to make the enforcement of these rights impossible, it ought to be reversed.

Apart from the power of the District Court to make an order of this kind upon such an application, the City of Boston contends that the order which the District Court did make was clearly wrong in substance. The City of Boston contends that the order was directly contrary to the clear mandate of Congress as established in federal statutes, and also that it was an attempt by a federal court to interfere with the application of local laws, contrary to established policy, and for declared reasons which were not valid. In support of its contention the City, as *amicus curiæ*, advances the following propositions, set forth here as the main headings of its argument:

I. Order No. 398 was contrary to the express provisions of federal statutes.

II. Order No. 398 was contrary to the express provisions of Massachusetts statutes and was an interference with Massachusetts laws.

III. There was no legal basis for this overriding of federal and state laws by the District Court.

IV. The unjustifiable hardship imposed on the City of Boston by Order No. 398 makes that order an abuse of discretion.

ARGUMENT

I

Order No. 398 was contrary to the express provisions of federal statutes.

A. Several federal statutes require trustees or other officers operating a property to pay current local taxes.

Section 65 of the Judicial Code (28 U. S. C. § 124) imposes a criminal penalty upon a receiver or manager who fails to operate the property according to the requirements of the valid laws of the state in which the property is situated, in the following words:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both.".

The Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. § 124a, apparently intended to follow Section 65 of the Judicial Code) states clearly the duty of any receiver, trustee, or other officer appointed by a United States court, to pay all state and local taxes, in the following words:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however*, That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such

taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same.".

Section 66 of the Judicial Code (28 U. S. C. § 125), though not containing the explicit commands of the two statutes just mentioned, is further evidence that Congress has recognized the necessity of a compliance with local laws by receivers or other persons managing property under appointment by a United States court. That section is as follows:

"*Every receiver or manager of any property* appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.".

Section 24 (1) of the Judicial Code (28 U. S. C. § 41 (1))[1] also shows that Congress has recognized the necessity of paying local taxes and preventing interference by United States courts with local agencies whenever possible. In this section as amended in 1937 (the 1940 amendment not being relevant here) the pertinent words are the following:

" * * * * * * Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.".

[1] As last amended Aug. 21, 1937, c. 726, § 1, 50 Stat. 738, and Apr. 20, 1940, c. 117, 54 Stat. 143.

All the statutes quoted above show a consistent congressional policy. Whatever may formerly have been the chances for nice distinctions based on this multiplicity of pronouncements, the Act of 1934 (28 U. S. C. § 124a), quoted above, removes all doubts as to the duty of trustees operating a business property to pay current local taxes, and leaves no room for a United States court to make any order other than that the taxes be paid.

Boteler v. *Ingels*, 308 U. S. 57 (affirming 100 F. 2d 915).

Thompson v. *Louisiana*, 98 F. 2d 108, 111 (C. C. A. 8th, 1938).

See also *Board of Directors of St. Francis Levee Dist.* v. *Kurn*, 98 F. 2d 394, 397 (C. C. A. 8th, 1938), cert. den. 305 U. S. 648.

In *Boteler* v. *Ingels*, Mr. Justice Black said (at page 52):

> "We need not determine whether, without legislation such as the 1934 Act, the fact that a local business in bankruptcy is operated by a bankruptcy trustee makes the business immune from State laws and valid measures for their enforcement. Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes 'the same as if such business [es] were conducted by an individual or corporation.'".

In *Thompson* v. *Louisiana* the proceedings were commenced by the state under the Declaratory Judgment Act (Judicial Code, § 274d; 28 U. S. C. § 400)[1] to have it adjudged

[1] As added June 14, 1934, c. 512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.

that the trustee of the property of a railroad in reorganization was liable for a state franchise tax. The court held that the taxes were a proper expense of administration and said that the effect of 28 U. S. C. § 124a was to require that all doubts be resolved in favor of the state taxes. The court then quoted from the opinion of Mr. Justice Cardozo in *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334 (at page 344), as follows:

> "Taxes owing to the Government, whether due at the beginning of a receivership or subsequently accruing, are the price that business has to pay for protection and security.".

After this quotation, the court, in *Thompson* v. *Louisiana*, said (at page 111):

> "There was more or less doubt and uncertainty as to whether, or under what conditions, receivers, liquidators, referees, trustees, or other officers appointed by Federal courts to conduct any business should be liable for local taxes applicable to the business conducted. In this state of affairs, Congress passed Section 124a, for the manifest purpose of putting at rest all doubt and uncertainty in this regard.
>
> "* * * * There were controversies between the state taxing authorities and the various liquidating agencies appointed by the Federal courts as to the liability for such taxes. Congress has, in the interest of justice or good will, by this Act directed the trustee to pay rather than litigate these tax claims. By the sweeping terms of this statute all doubts have been resolved in favor of the state taxes.".

In the memorandum of the decision on the petition for Order No. 398 (R. 17) in the Connecticut District Court it is stated that *Thompson* v. *Louisiana* is not applicable

because "No question of a lessee's liability for the lessor's obligation was there involved". This attempted distinction, which is also the theme of a large part of the petitioners' brief, is not, it is submitted, a valid one. The argument for which that case was cited, and for which it and *Boteler* v. *Ingels* are here cited, is not based on any relationship between lessor and lessee. It is based, instead, upon the clear duty imposed by statute upon the persons who undertake to operate a business enterprise in receivership or reorganization. If, because of the circumstances of this particular case, this may as a practical matter subject the property of a former lessee to the danger of some loss, that is simply one of the results of the position of the Trustees and has nothing to do with the principle behind the clear requirements of the law. (The irrelevancy of these considerations as an argument against the application of § 124a is dealt with at a later point in this brief, *infra*, 35.)

Without reliance on 28 U. S. C. § 124a, it has been held that § 124, which was passed long before, withholds from District Courts the power to authorize a disregard of local laws in regard to taxation.

Gillis v. *California*, 293 U. S. 62.

Although these statutes have done away with any uncertainty which might otherwise have existed, the principle which they declare is a well-established one.

MacGregor v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574 (C. C. A. 2d, 1930).

Central Vermont Ry. Co. v. *Marsch*, 59 F. 2d 59 (C. C. A. 1st, 1932).

Hennepin County, Minn. v. *M. W. Savage Factories, Inc.*, 83 F. 2d 453 (C. C. A. 8th, 1936).

The principle is well stated in *Hennepin County, Minn.* v. *M. W. Savage Factories, Inc.*, where Sanborn, Circuit Judge, said, at page 455:

> "It seems to be well settled that when receivers take over mortgaged real estate and use it for the actual or potential benefit of their trust estate, they are ordinarily obliged to pay current taxes as they accrue, whether the taxes are mere charges against and liens upon the property, as in Minnesota, or are the personal obligations of the owners. This is not because such taxes are debts of the insolvent or the trust estate, or because the receivers have assumed the obligations of the mortgagor to pay taxes upon the mortgaged premises, but because the receivers are operating the property, and current taxes are to be regarded as ordinary expenses of operation. To escape the obligation to pay such taxes, a receiver must, within a reasonable time, repudiate the property as a burden upon the estate. He cannot accept the benefits and escape the burdens of operation.".

In the case at bar the Circuit Court of Appeals based its decision squarely on the direct duty imposed by 28 U. S. C. §§ 124 and 124a (R. 192). It felt that the clear provisions of those two statutes cut across any arguments which might otherwise be made, and relieved it of the necessity of deciding how these taxes should be classified if § 124a had not been passed. Thus, the court said, it was not necessary to decide whether these taxes were operating expenses (R. 192). It also said that it was not necessary to decide whether § 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6) in and of itself required the lessee to pay these expenses (R. 192). We agree that § 124a has this simplifying effect, and that the argument might rest here. But it should be noted that the Circuit Court of Appeals did

not say, and we do not say, that §§ 124 and 124a are the sole reasons why the District Court was wrong. It merely says that they are such conclusive reasons that it does not need to examine the others. Therefore, while it seems advisable for us, in this argument, to examine these and other points which the Circuit Court of Appeals quite properly felt were not necessary to its decision, it should be borne in mind that such a discussion is merely supplementary to the argument resting on the clear requirements of §§ 124 and 124a. (The character of these taxes as current operating expenses is discussed below, at page 25. The relevancy and effect of § 77 (c) (6) are discussed below, at pages 21 and 41.)

Going further than the opinion of the Circuit Court of Appeals, we suggest that §§ 24 (1) and 66 of the Judicial Code (28 U. S. C. §§ 41 (1) and 125), quoted *supra*, 14 are additional reasons why Order No. 398 was wrong. Granted that under certain conditions a federal court in charge of a reorganization may properly issue injunctions which will "continue indefinitely to hold off the tax gatherer from taking direct action against the property" (see opinion, R. 192), and granted that the orders of the Connecticut District Court in this case have so far had that practical result, it does not follow that the Connecticut District Court acted in conformity to those two sections in this case. It would seem that those two sections were designed to leave local judicial and administrative machinery free to operate as far as possible without interference from federal courts, and that such interference can be justified only where it is absolutely necessary, and only for the purpose of changing the manner of enforcement of the local laws. In *Board of Directors of St. Francis Levee Dist.* v. *Kurn*, 98 F. 2d 394 (C. C. A. 8th, 1938), cert. den. 305 U. S. 648,

cited in the opinion of the Circuit Court of Appeals (R. 192), the facts were different in several respects from those in the case at bar. In that case the taxing authorities had already started suits in the state courts, and the injunction of the federal court dealt with a specific proceeding. But, which is more important, the federal court merely restrained a specific type of interference with the property because it said that the remedy in the state courts was not adequate, and the federal court stated unequivocally that these very taxes should be enforced "just as would be done by the state courts of Arkansas in a proper case" (98. F. 2d at 397). In the case at bar the action of the Connecticut District Court was quite different. Without any showing of attempts by the local authorities to enforce the taxes by suit or other action, or that there was not an adequate remedy in the courts of Massachusetts, it issued blanket injunctions immediately on the approval of the reorganization petitions (R. 50, 82, 127), which effectively prevented any collection of the current taxes by the usual means, and then by Order No. 398 made it impossible for the taxing authorities to collect their taxes by the only other means left open to them. This action seems hardly to be in accordance with the intent of 28 U. S. C. §§ 41 (1) and 125, to say nothing of §§ 124 and 124a.

Pennsylvania v. *Williams*, 294 U. S. 176.
Baker v. *Atchison, T. & S. F. Ry. Co.*, 106 F. 2d 525, 529 (C. C. A. 10th, 1939), cert. den. 308 U. S. 620.

B. *The New Haven Trustees are the officers operating the properties to which these current local taxes are assessed.*

This seems to be clearly established. It is stated by the District Court in the memorandum on the decision accom-

panying Order No. 398 (R. 12, 15). The basis for it is found in the order approving the petition for reorganization of the Old Colony (Order No. 74, R. 81), the order appointing trustees of the Old Colony (Order No. 75, R. 85, 87), and the order requiring disaffirmance of the Boston and Providence lease (Order No. 217, R. 110, 112). It is also stated in a brief of the New Haven Trustees filed in the Supreme Judicial Court of Massachusetts (R. 156, 177).

It is clear from the foregoing orders and statements that the operation of the properties is by the New Haven Trustees *as such*, and not, as now suggested by the petitioners in their brief (pages 18–24), merely by the same individuals in a different capacity. Order No. 74, approving the reorganization of the Old Colony in the New Haven proceedings, directs that "the Trustees of the property of the Debtor continue to possess and operate the petitioner's property" (R. 81). Order No. 75 directs that the properties of the Old Colony be operated by "said Trustees of The New York, New Haven and Hartford Railroad Company, as such" (R. 87). Order No. 217 directs that the operation of the Boston and Providence properties "shall be conducted by the New Haven Trustees" (R. 112). These orders were made pursuant to the provisions of § 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6)), quoted *infra*, 48, which requires such operation after the rejection of a lease until the abandonment of the line is authorized by the Interstate Commerce Commission, where the judge decrees after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the line.

The reasons given for the decrees pursuant to this statute, and the other proceedings connected with them, show that it was an essential part of the whole arrangement that the New Haven Trustees as such should operate the properties.

They were given the management of the Old Colony and the Boston and Providence properties not by coincidence or because they were used to managing railroad properties, but for the very reason that they were Trustees of the property of The New York, New Haven and Hartford Railroad Company. The Old Colony was granted reorganization in the New Haven proceedings on the basis of a petition which alleged in part (R. 70):

> " * * * said lines and those of the Debtor are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtor and that of the petitioner are now so closely interrelated that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court * * * ".

The filing of that petition was authorized by the Board of Directors of the Old Colony (R. 71), and their election was controlled by the New Haven (R. 81). The order appointing trustees of the Old Colony (Order No. 75, R. 85) contains various recitals, already described (*supra*, 4), to the effect that the Old Colony property should continue to be operated as part of the New Haven system, even to the extent of mingling the funds, income, assets and equipment (R. 85–89).

As far as the taxes assessed upon property actually owned by the Old Colony and the Boston and Providence are concerned, nothing more needs to be said. As stated in the petition of the New Haven Trustees (R. 6), part of the current real estate taxes which Order No. 398 directed them not to

pay are assessed on such property, and, as has been shown above, the New Haven Trustees are operating that property under orders of the Connecticut District Court.

The taxes assessed upon the property of The Boston Terminal Company, while different in some respects, are nevertheless assessed to properties operated by the New Haven Trustees, and are as much expenses of operation of those properties and "applicable to such business" as are taxes on property actually owned by the Old Colony and Boston and Providence. The New Haven Trustees themselves seem to have assumed this in their petition for Order No. 398, at least as to the current taxes which are still unpaid (R. 6). Their basis for calculating the amount for which they might be liable if part of the taxes had not been paid may be mistaken (see *supra*, 9), but that point is not now important and they do not raise any question that the Old Colony and Boston and Providence estates are subject to payment of the unpaid balance of the current taxes on the Terminal Company property. The liability of the properties operated by the New Haven Trustees for the real estate taxes on the Terminal Company property can be arrived at by several methods under Chapter 516 of the Special Acts of Massachusetts of 1896 (*infra*, 48). Section 25 (R. 154) is as follows:

> "Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, *but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies*, and in the assessment of franchise taxes upon said railroad companies each of them shall be

deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act.". (Italics ours.)

The "said railroad companies" required to use the real estate of the Terminal Company are named in Section 2 of that Act (*infra*, 49) and include the Boston and Albany, the Boston and Providence, the Old Colony, and the New Haven. The taxes on the Terminal Company property have been assessed not only to the Boston and Providence and the Old Colony but also to the New Haven (R. 179, see note, *supra*, 8). There is considerable basis for arguing that the New Haven Railroad itself, not merely through the Boston and Providence and Old Colony, but directly as a part of the operation of its own system, is using the terminal facilities provided by The Boston Terminal Company even though assertions that it is not are contained in the petitioners' present brief (pages 14, 15). Statements to that effect appear in a brief of the New Haven Trustees (R. 156, 158, 159). A further basis for such a conclusion is found in Order No. 75 (R. 85) where it is stated that the interests of the public and the railroads require that the railroad lines and property of the Old Colony "be operated as an integral part of the system of railroads now being administered by the Trustees of The New York, New Haven and Hartford Railroad Company", and the power given to the New Haven Trustees in that same order (R. 89) "to deal with all the property subject to their control as a single railroad system". If it were necessary to do so, the obligation to pay these taxes could be found in the New Haven's own direct use of the terminal facilities. But this is not necessary because it is nowhere questioned that the Old Colony and the Boston and Providence are using them and

that the New Haven Trustees are also operating those lines as officers of the court. (See the statement to this effect in the District Court's memorandum (R. 15).)

C. *These taxes are current expenses, and not claims in bankruptcy proceedings.*

These taxes were assessed as of January 1, 1939.[1] The New Haven Trustees were originally appointed in 1935 (R. 53) and the present Trustees have continued since 1937 (R. 94). The New Haven Trustees were ordered to operate the Old Colony in 1936 (R. 81, 87) and to operate the Boston and Providence in 1938 (R. 112), and have done so continuously since then (*supra*, 7). The petitions for reorganization were approved for the New Haven in 1935 (R. 44, 62), the Old Colony in 1936 (R. 81, 83), and the Boston and Providence in 1938 (R. 126, 128). Thus, all the properties in question were in reorganization and being operated by the New Haven Trustees under orders of the District Court at the time when these taxes were assessed. It is clear that in these circumstances the taxes are not claims, such as those of creditors, but are as much a part of the operating expenses "as heat, custody or current upkeep", and as such are applicable to the business conducted by these officers of the court, within the meaning of the federal statutes.

Swarts v. *Hammer*, 194 U. S. 441.
Boteler v. *Ingels*, 308 U. S. 57.
MacGregor v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574, 576 (C. C. A. 2d, 1930).
Central Vermont Ry. Co. v. *Marsch*, 59 F. 2d 59, 60 (C. C. A. 1st, 1932).
Hennepin County, Minn. v. *M. W. Savage Factories, Inc.*, 83 F. 2d 453, 455 (C. C. A. 8th, 1936).

[1] Similar taxes have been assessed as of January 1, 1940.

D. *Order No. 398 results in the non-payment of these taxes.*

The orders issued by the District Court for the operation of the properties of the Old Colony and Boston and Providence empowered the New Haven Trustees, and only the New Haven Trustees, to pay taxes and current operating expenses (R. 88, 112). These orders also gave the New Haven Trustees, and only the New Haven Trustees, the power to collect all the revenues from the properties (R. 87, 112). The orders approving the respective reorganization petitions contained injunctions designed to prevent any action against the property or procedure by suit or otherwise in state courts to enforce payment of the taxes. This appears to leave the taxing authorities without any means to enforce these taxes except by application to the Connecticut District Court for an order to the New Haven Trustees to pay them. But as that court has instructed the New Haven Trustees, by Order No. 398 (R. 20), to withhold payment of these very taxes, such an application would, as long as Order No. 398 stands, appear to be useless. Whatever may be the legal theories involved, the net result is that by virtue of various orders of the Connecticut District Court, culminating in Order No. 398, these taxes are not paid, and cannot be collected.

II

Order No. 398 was contrary to the express provisions of Massachusetts statutes and was an interference with Massachusetts laws.

The assessment and collection of the taxes on the properties owned by the Old Colony and Boston and Providence, which are mentioned in paragraph 4 of the petition for

Order No. 398 (R. 6), are controlled by general provisions of the statutes of Massachusetts. General Laws (Tercentenary Edition), c. 59 (Assessment of Local Taxes), c. 60 (Collection of Local Taxes). Chapter 59 contains provisions for abatements by the assessors upon application, and upon appeal to the Appellate Tax Board. (See Sections 59 through 65A.) In Chapter 60, Sections 16–22 provide for preliminary proceedings for collection, Sections 24–28 for collection by distress, Sections 29–34A for collection by imprisonment, Sections 35 and 36 for collection by suit, at any time after three months from its commitment to the collector, and Sections 37–60 for a lien upon the land for all taxes and incidental charges from January first in the year of assessment, and for collection by a sale or taking of the land to enforce this lien. These provisions are supplemented by Chapter 58A concerning the Appellate Tax Board, and also providing for appeals from that Appellate Tax Board to the Supreme Judicial Court. The payments mentioned in paragraph 5 of the petition for Order No. 398 (R. 6), consisting of real estate taxes, franchise taxes and bond interest in connection with the Boston Terminal Company, are all controlled by the special statute already mentioned, namely, Chapter 516 of the Special Acts of 1896 (*infra*, 48). The provisions of this statute have been summarized in the statement of the case at the beginning of this brief (*supra*, pages 7, 8). Section 25 of that statute, which provides for the assessment and payment of the taxes, is also printed in full on page 23 of this brief and page 154 of the Record. In addition to the remedies for non-payment of taxes, given by the general statutes of Massachusetts (see *supra*, page 10), and the usual remedies open to bondholders and mortgagees for the enforcement of the obligations running to

them, the Special Act of 1896 contains, in Section 10 (*infra*, 53), a special provision giving the Supreme Judicial Court of Massachusetts jurisdiction in equity to compel payments by the several railroads to the Terminal Company of the amounts necessary to pay the various expenses, including taxes and the interest upon its bonds. This remedy seems to be cumulative and in addition to all other ordinary remedies.

Thus, it will be seen that the whole subject of the payments mentioned in paragraphs 4 and 5 of the petition for Order No. 398 is covered, at least as far as Massachusetts is concerned, by Massachusetts statutes and laws, and that a complete system is provided for their determination and enforcement. It should be noted particularly that provisions are made for the adequate determination of the validity and fairness of any taxes assessed, and for a reduction of these assessments if they are excessive. This provides a unified system of determination by expert local and state agencies, with review by the highest court of the state.

Order No. 398, taken together with the injunctions previously issued (R. 50, 82, 127), is an attempt not only to stop all the machinery of this unified Massachusetts system, but to prevent the carrying out by any agency of the obligations imposed by these statutes. In effect, it directs the New Haven Trustees not to comply with them, and does not provide for any other compliance or enforcement. As far as the taxes are concerned it was apparently expected by the court that there would be no compliance with the obligations of the statutes, for the memorandum of the decision on the petition for Order No. 398 states that "there is no pretense here that failure to pay the taxes in question on the due date will result in an interruption of operation" (R. 17).

III

There was no legal basis for this overriding of federal and state laws by the District Court.

One difficulty in considering Order No. 398 is that of finding the procedural basis on which it was made. Before considering whether its substance was in accordance with statutes and cases, or whether it was a proper exercise of discretion, we ought to find some authority, express or implied, requiring the Connecticut District Court to make such an order on application by the New Haven Trustees, or to exercise its discretion on the merits. There does not seem to be any such authority. The Constitution of the United States provides, in Article X of the Amendments, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." There does not seem to be anything in the Constitution or in the laws made pursuant to it, which delegates any such power as the District Court purported to exercise by Order No. 398.

A. *The Bankruptcy Act does not confer any such power.*

The only apparent justification for any such action under the Constitution of the United States would seem to rest on Article I, § 8, giving Congress the power to establish "uniform laws on the subject of Bankruptcies." But the action by Congress under that provision of the Constitution does not seem to have contemplated this kind of order.

Section 77 of the Bankruptcy Act (11 U. S. C. § 205) contains no specific provision for an order of this kind, and there does not seem to be anything in that section from which power to make such an order can be implied. The only possibility is § 64a (11 U. S. C. § 104a), but that deals

with debts which are to have priority in the payment out of a bankrupt estate, which is quite a different thing from current taxes assessed after the appointment of a trustee in a railroad reorganization proceeding.

MacGregor v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d, 574, 576 (C. C. A. 2d, 1930).

Even without that distinction, the failure of Congress in § 77 to make any specific provision for interference with local affairs such as was made by this order is a strong ground for saying that it did not intend any such interference.

See *Swarts* v. *Hammer*, 194 U. S. 441.
Bowler v. *Ingels*, 308 U. S. 57.
Palmer v. *Massachusetts*, 308 U. S. 79.

In *Swarts* v. *Hammer*, Mr. Justice McKenna said (at page 444):

> "By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.".

Palmer v. *Massachusetts*, it is true, dealt with the attempted interference by a federal court with a different local agency — the Department of Public Utilities — but the language of

the decision applies with equal force to analogous interference by Order No. 398. The limited application of § 77 as a bankruptcy statute is explained in the following words of Mr. Justice Frankfurter (308 U. S. 86):

> "Not only is there no specific grant of the power which the District Court exercised, but the historic background of § 77, the considerations governing Congress in its enactment, and the scheme of the legislation as disclosed by its specific provisions reject the claim. Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act. But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

That the reasoning in this case is not confined to a particular local agency such as the Department of Public Utilities is shown by footnote 17 on page 90 of that case, part of which reads as follows:

> "Section 65 of the Judicial Code (36 Stat. 1104, 28 U. S. C. § 124) decisively indicates that Congress did not intend that those who operate a business under

the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power.".

This is in accord with *Gillis* v. *California*, 293 U. S. 62.

In addition, not only as a statement of law on the technical question but also as a statement of general principle, on the matter of conflicting jurisdiction, applied to this very reorganization, the following further quotation from *Palmer* v. *Massachusetts* is pertinent (308 U. S. 83):

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.".

B. *This was not a legal declaratory judgment.*

As has already been pointed out (*supra*, 15), it is possible in a railroad reorganization to get a ruling by a District Court on a matter of this kind by a proceeding under the federal Declaratory Judgment Act (28 U. S. C. § 400). This was done in *Thompson* v. *Louisiana*, 98 F. 2d 108 (C. C. A. 8th, 1938), on a proceeding initiated by the state taxing authorities. But there is no indication in the Record

in the case at bar, nor any intimation elsewhere, that Order No. 398 was issued in any such proceeding. Instead, the New Haven Trustees asked the court to issue that order, and there does not seem to have been any discussion of the court's authority to make it. But, while no steps were taken to make the City of Boston a party, as a practical matter the order is as conclusive as a legally binding adjudication, because the City cannot, without going contrary to the terms of the various injunctions (R. 50, 82, 127), enforce its rights by the other remedies provided by state law; and the District Court which has power to issue an order for payment of the taxes, upon an application by the City, is the same one which has issued Order No. 398. Thus we have a declaratory judgment as practical matter, but without reliance on the federal act which might provide a legal basis for jurisdiction by the District Court.

C. *This interference by the federal court was contrary to established policy where state agencies are concerned.*

Even if it might be possible to find some technical basis for jurisdiction of a District Court to interfere with the application of local laws in a situation of this kind, the District Court should not have exercised it in this case, but should have left the matter to be worked out by the local agencies — at least until there had been some demonstration of difficulty. This has been a firmly established policy declared by the cases.

Pennsylvania v. *Williams*, 294 U. S. 176, 183, 185.
Thompson v. *Magnolia Petroleum Company*, 309 U. S. 478.

See also Warren, *Federal and State Court Interference*, 43 H. L. R. 345, 375, 378.

Where, as here, the federal court which is asked to interfere is located outside the state whose laws would be affected, there is even a stronger reason for keeping its hands off.

Palmer v. *Massachusetts*, 308 U. S. 79, 89.

It is suggested in a footnote to the article in 43 H. L. R. 345, at page 378, that an aid to the solution of this delicate problem of conflicting jurisdiction would be the setting up of adequate machinery in the states for settling questions of taxation, and correcting injustices. The machinery provided by Massachusetts for these purposes seems to be about as complete as could be asked. It has already been described briefly above at page 27. There has been no suggestion that it is inadequate for the determination of any questions in regard to the application of these taxes. Ordinarily, under these circumstances, the remedies provided by the state laws would first have to be exhausted before a federal court could interfere.

First National Bank of Greeley v. *Board of County Commissioners*, 264 U. S. 450.

It should be noted that the taxes which the New Haven Trustees were ordered not to pay were assessed directly to the New Haven itself, as well as to the Old Colony and Boston and Providence (R. 179, *supra*, 8). Apart from any other basis of liability, this in itself imposed a liability on the New Haven Trustees to pay them. If the Trustees felt that this assessment was erroneous for any reason, they had ample opportunity to get relief through the administrative and judicial machinery provided by Massachusetts

laws. There was no ground for interference by a federal court until they had at least made an attempt to use this machinery or show that it was inadequate.

It may be said that Order No. 398 was not intended to be an interference with the laws of Massachusetts, but merely a direction to the New Haven Trustees in their dealings between the various estates in their hands. But the wording is not so limited — it is to "withhold the payments listed in Paragraphs 4 and 5 of said petition" (R. 20), and these paragraphs describe taxes which are said to be, or about to be, "due and payable" (R. 6). That the petitioners and the District Court expected as a practical matter that the taxes would not be paid is shown by the petitioners' statement that the payments would not be essential to their operation of the railroads (R. 10), and the statement in the District Court's memorandum that they are "an expense which is not indispensable to the continuance of operation" (R. 17); and the only possible legal effect was to make it impossible for the City of Boston to collect its taxes. The net result was an interference with state laws which could not be justified by the circumstances.

D. *The possible effect on the New Haven estate is not a relevant consideration in determining the validity of Order No. 398.*

The requirements of the Massachusetts statutes imposing these taxes are clear. The requirements of the federal statutes that taxes so imposed be paid are also clear. They apply to the New Haven Trustees, who, as such, are operating these properties. There is no provision in those laws making the collection of taxes contingent on the existence of sufficient funds in the hands of the operators, or the lack of financial strain on those who may be affected by their payment.

Therefore, the arguments based on the possible effect on the New Haven estate do not seem relevant.

The contention that the lack of funds in the estate which is being operated should be an excuse for non-payment has been treated in *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574, where L. Hand, Circuit Judge, said (at page 576):

> "The taxes accruing after the receivers entered are in a different position. They could have refused to accept the mill, if they had thought the equity a burdensome asset. Having elected to enter, they took it *cum onere*, and the taxes, which were a condition upon their continued occupation, were as much a part of their expenses as heat, custody or current upkeep. So far as we have found, courts have universally regarded them as part of the receivers' expenses, when the question has come up. * * * * It would be a curious doctrine which allowed the general creditors to avoid them because their venture turned out badly; their representatives must consider that at the outset. Every consideration of equity requires them to bear all charges incidental to the occupation which they have enjoyed."

The foregoing quotation is adopted with approval in *Central Vermont Ry. Co.* v. *Marsch*, 59 F. 2d 59, where Bingham, Circuit Judge, said (at page 62):

> "Counsel for the appellants seek to distinguish these cases on the ground that in New York state there is a lien for real estate taxes and therefore they are not applicable to the situation here. But in Massachusetts, where these taxes arose, taxes assessed upon land are a lien thereon. 1 General Laws of Massachusetts, c. 60, § 37."

In *Ingels* v. *Boteler*, 100 F. 2d 915, which was affirmed in *Boteler* v. *Ingels*, 308 U. S. 57, there was some question

as to whether the business then being run by a trustee in bankruptcy had enough funds with which to pay the license fees and penalties imposed by the state law, but the court held that that was no reason for not paying. When the case reached this Court that point was not even considered, for this Court held that the provisions of the Act of June 18, 1934 (28 U. S. C. § 124a), settled the matter. In *Gillis* v. *California*, 293 U. S. 62, the receiver was unable to get a surety on the bond required by state taxing authorities. This Court held that an order of the District Court purporting to relieve him of this necessity was invalid in the face of the clear requirements of 28 U. S. C. § 124. But in spite of this clear declaration of the statutes and the cases interpreting them, the possibility of loss as a result of making the payments seems to have been the controlling reason in the mind of the District Court in issuing Order No. 398. In the memorandum of the decision on the petition for Order No. 298 that court said (R. 13):

> "The cash outlay involved has all come from the New Haven estate and, subject in part to outstanding Old Colony bonds, has been charged as a prior lien against the estates of the lessors. The propriety of such charges has been finally adjudicated with respect to the Old Colony estate; I see no basis for differentiation with respect to the charges against the Boston and Providence estate. Heretofore no serious objection has been presented to the court to such use of New Haven funds. But the continued operation of the lessor properties at great loss and the resulting accumulation of liens as aforesaid has now so impaired their respective capital accounts that the New Haven trustees report that they cannot say with complete assurance that the lessor estates are adequate to support further advances without jeopardy to the New Haven security

holders having the beneficial interest in the funds advanced. And the factual basis for this view was not questioned at the hearing.

"There are outstanding secured obligations of the New Haven on which the aggregate interest in default is upwards of $40,000,000. Representatives of these security holders appeared at the hearing in opposition to further advances for the purposes stated from New Haven funds. On fundamental principles of equity it is wholly clear that in the situation as it has now developed the court may not properly subject these equities to the hazard of further advances. The advances must be withheld unless required by some mandatory obligation resting on the New Haven trustees.".

It is submitted that the District Court in making Order No. 398 paid too much attention to "the hazard of further advances", which the cases cited show is not a relevant consideration, and did not pay enough attention to the fact that these advances were "required by some mandatory obligation resting on the New Haven trustees".

It should be noted that there is nothing in the record to show with certainty that there is no money available or coming in from which these payments can be made. Order No. 75, empowering the New Haven Trustees to collect "the accounts, revenues, income, rents, profits and tolls accrued from" the railroads and properties of the Old Colony (R. 87), and Order No. 217, empowering the New Haven Trustees to conduct the operation of the Boston and Providence properties for the account of the Old Colony estate (R. 112), are still in force, and it is obvious that as long as freight or passenger trains are run by those railroads there is at least some income available to the New Haven

Trustees. There is nowhere any mention of the possibility of raising the necessary cash by the common device of receivers' certificates and it does not appear that the cash is not still actually available without going to that length. All that appears is that (R. 13) "the New Haven trustees report that they cannot say with complete assurance that the lessor estates are adequate to support further advances without jeopardy to the New Haven security holders having the beneficial interest in the funds advanced". The suggestion that this is a reason for a federal court order not to pay current taxes seems to be a repetition of the one described in *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574, 577 as a "curious doctrine" (*supra*, 36).

While we still maintain that the effect on the New Haven estate is irrelevant here, and that the leases have nothing to do with the requirements of the federal statutes, any argument based on the hardship to the New Haven estate is unconvincing as well as irrelevant. The Old Colony and Boston and Providence are still part of the New Haven system, and are being operated by the New Haven Trustees as such because the District Court was of the opinion that the continuity of that system should not be disturbed (R. 85, 87), and because those two railroads are wholly without any operating organization (R. 112). But this situation is one for which the New Haven management is responsible. They were an independent system when the New Haven entered into the lease of their property (R. 72). There is no suggestion that the New Haven system as a whole should not continue in operation. Under these circumstances it might well be regarded as reasonable if the Interstate Commerce Commission or other administrative agency having jurisdiction should refuse to allow the New Haven to escape the

obligations which it assumed when it entered into the lease, merely because those parts of it have become unprofitable.

See *Missouri Pacific Railway Company* v. *Kansas*, 216 U. S. 262.

That question does not need to be decided here, but is mentioned merely to show that the present situation whereby the New Haven Trustees are operating the roads under § 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6)) is not without some foundation of voluntary action by the persons who are financially interested in the New Haven estate. This is not a case where, as suggested in the petitioners' brief (p. 23), the New Haven Trustees "happen to be trustees" of two separate estates. The whole situation was planned deliberately, and is based on the voluntary act of the New Haven in taking the Old Colony and the Boston and Providence into its system originally. If there were no reorganization the New Haven would still be responsible for the Old Colony and the Boston and Providence. It is no hardship, therefore, to require it to continue its responsibility for a while during those proceedings — at least until the proper administrative body allows the New Haven to relinquish it. And there is nothing in the Record to show that this operation of the Old Colony and Boston and Providence properties was assumed against the will of the New Haven security holders. There is some basis for a contrary conclusion from the request by the Old Colony that the New Haven Trustees operate it (R. 70), and the fact that the New Haven controlled the directors of the Old Colony who authorized the Old Colony's request (R. 81).

The explanation just made is not, however, a necessary reason for the liability which results from the federal statutes. It merely shows that in this case the liability is not a hardship. It is interesting, but not necessary, to find out *why* the New Haven Trustees, as such, are operating the properties to which the taxes of the City of Boston are applicable. The fact that is significant is that the New Haven Trustees, as such, *are* operating the property, and hence they are the people who, under those statutes, are required to pay them.

Order No. 398 is not limited in its effect to the estates of the three railroads. If it were, there might be some basis for the petitioners' arguments referring to the leases. But it goes further than that, and stops payment of obligations which are in no way founded on the leases. In this respect it is distinguishable from *In re Reorganization of Pittsburgh Rys. Co.*, 111 F. 2d 932 (C. C. A. 3rd, 1940), certiorari granted October 14, 1940, which as *Philadelphia Company* v. *Dipple*, Oct. Term, 1940, Nos. 242, 243, is assigned for argument immediately following the case at bar.

In the *Pittsburgh Rys.* case, the only obligation that the trustees of the debtor had in regard to the operation of the underlying companies was founded on leases and on contracts. The reorganization was one under Chapter X of the Bankruptcy Act (11 U. S. C. § 501) instead of § 77, and hence the trustees were not operating pursuant to a requirement of law such as § 77 (c) (6) (11 U. S. C. § 205 (c) (6)). The court did not cite 11 U. S. C. § 124a. In the case at bar there can be no question that the operation of the properties to which the taxes are assessed is by order of a United States court. The leases may have been one of the reasons why the orders for operation were made, but the obligation

of the New Haven Trustees to the City of Boston for the taxes rests, not on the leases, but on the fact that they are operating the properties pursuant to orders of the federal court.

In regard to this same situation it was held that the Connecticut District Court, in order to assure the continuance of the rail service, could grant a lien on the operated property in its custody.

Warren v. *Palmer*, 310 U. S. 132, 139, 140.

But it is not intimated in that case, and there is no basis for saying, that the court having custody could go beyond this method of inducement and, in its discretion, relieve the agents operating the properties from paying current operating charges by nullifying state laws.

The case of *Dulberg* v. *Zankel*, 67 F. 2d 534 (C. C. A. 2d, 1933) cited in the petitioners' brief (page 25), is likewise distinguishable from the case at bar in several respects. On the point for which it is cited by the petitioners, the distinction is found in the fact that while there was one receiver, he was not authorized to operate one property in his capacity as receiver of another. In the case at bar the New Haven Trustees *as such* were managing the property of each of the companies and the obligation to pay the taxes was imposed upon them in that capacity. At the time of the decision in *Dulberg* v. *Zankel*, 11 U. S. C. § 124a was not in effect. As that decision was by the same Circuit Court of Appeals which reversed Order No. 398 on the basis of §§ 124 and 124a, it is reasonable to suppose that the court was cognizant of that case and that its failure to cite it, referred to in the petitioners' brief (page 24), was because it did not consider it to be relevant.

IV

The unjustifiable hardship imposed on the City of Boston by Order No. 398 makes that order an abuse of discretion.

It is a well-established principle that the very existence of the government itself is dependent upon its power to obtain without delay sufficient revenue to carry on its functions. Therefore, imperative necessity has forced a distinction between claims for taxes and all other claims, and has recognized the right of the government to collect taxes in a summary manner.

> *Murray's Lessee, et al.* v. *Hoboken Land & Improvement Co.*, 18 How. 272.
>
> *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589.

It is a common thing for governments to provide for the summary collection of taxes, and this procedure has been followed in Massachusetts. (See General Laws of Massachusetts [Tercentenary Edition], c. 60, §§ 19, 24, 27, 29, 35, 37–55.) The federal statutes which we have been discussing seem to show a congressional recognition of this necessity for immediate revenue. The City of Boston is not different in this respect from other governments or their subdivisions.

Although taxes on property in receivership or reorganization are regarded as expenses of administration as much as any other current expenses (*supra*, 25), there is one difference between taxes and other operating expenses. Those persons or companies who furnish labor, fuel, supplies, and other facilities necessary to the operation of the rail-

roads, can at least refuse to furnish them any longer if they do not receive payment for them. But the cities must continue to furnish police and fire protection and the other municipal services for which taxes supply the funds, even though these particular taxes are not paid. This is not contemplated by law but is directly opposite to the intention of the law.

See *Swarts* v. *Hammer*, 194 U. S. 441, 444.

Ordinarily, the city might enforce its lien or collect its taxes by suit or by the various other methods provided by local statutes. But in view of the injunctions issued in these reorganization proceedings (R. 50, 82, 127) these remedies may be of no practical value. This practical difference between taxes and other current expenses seems to have been recognized in the issuance of Order No. 398, for the court states in the memorandum (R. 17):

> "And there is no pretense here that failure to pay the taxes in question on the due date will result in an interruption of operation."

The only reason why this failure will not result in an interruption of operation is because the local authorities are helpless to exert the power which the law gave to them, and that they must continue, until they can find some solution, to incur expense for municipal services for the benefit of these operations without receiving the taxes which help to pay for those services. The other taxpayers of the city are obliged to contribute currently to municipal expenses, and they are now asked to bear an additional burden, apparently because, as the court says in the memorandum (R. 13):

"the New Haven trustees report that they cannot say with complete assurance that the lessor estates are adequate to support further advances without jeopardy to the New Haven security holders having the beneficial interest in the funds advanced.".

It would seem that some of the federal statutes referred to above were intended for just this situation. When the New Haven Trustees asked the Connecticut District Court which appointed them for advice as to their duty in regard to the taxes, the court might have called attention to the criminal penalties provided in 28 U. S. C. § 124 (*supra*, 13), and the specific mandate of 28 U. S. C. § 124a (*supra*, 13), and then told the petitioners that the only order that it could make was that they should pay the taxes. It could have quoted, as a statement of its duty, the following from *Hennepin County, Minn.* v. *M. W. Savage Factories, Inc.*, 83 F. 2d 453, 457:

"If the trustees can still secure a reduction in the amount of the taxes assessed, they should be permitted to do so, but the court below should see to it that these taxes, in so far as they are valid liens upon the real estate, are paid by the trustees.".

But the court did not do that. Instead, it made an order telling them not to pay the taxes. It is submitted that that order was invalid. To give it any validity would result in a situation aptly described in the following words of Mr. Justice Cardozo in *Michigan* v. *Michigan Trust Company*, 286 U. S. 334 (at page 345):

"* * * * To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be an injustice to the state and a reproach to equity.".

By Order No. 398 the City of Boston is left with no rights — not even theoretical ones. In making that order the District Court looked only at the possible hardship on the New Haven estate and disregarded the certain hardship on the City of Boston. If the situation was one where the District Court had any right to exercise its discretion, the order which it made was clearly an abuse of discretion.

See *Foust* v. *Munson S. S. Lines*, 299 U. S. 77, 84, 87.

CONCLUSION

The City of Boston, which appears as *amicus curiæ* in this case, is not concerned with the various obligations between the estates of the Old Colony, Boston and Providence, and New Haven railroads based on the leases made in 1888 and 1893. It is not a party to the reorganization proceedings pending in the Connecticut District Court where Order No. 398 was made. It had nothing to do with the disaffirmance of those leases, nor with any of the questions arising out of their disaffirmance. But under the clear provisions of the statutes of Massachusetts the City of Boston is entitled to receive taxes assessed on the properties of some of those railroads which are being operated by the New Haven Trustees. Specific provisions of federal statutes require those Trustees to pay those taxes. In the face of these requirements the Connecticut District Court, upon the application of the New Haven Trustees, and without making the City of Boston a party to the proceedings, by Order No. 398 purported to relieve the New Haven Trustees from the necessity of paying the taxes. As the New Haven Trustees are the only persons from whom the City of Boston can, consistently with other orders of the Connecticut District Court, obtain payment of its taxes, and as

the New Haven Trustees will not pay them as long as Order No. 398 remains in effect, that order has deprived the City of Boston of all theoretical and practical chances to obtain payment of them.

In the proceedings on the appeal from Order No. 398 by others, the City of Boston as *amicus curiæ* submits that as there was no express or implied basis to be found in the Bankruptcy Act, or elsewhere, for this overriding of federal and state laws; as this interference by the District Court was contrary to the established policy in cases concerning state agencies; as the possible effect on the New Haven estate, which was given as the principal reason for the issuance of the order, was not a relevant consideration; and as the unjustifiable hardship imposed on the City of Boston was an abuse of discretion; the Circuit Court of Appeals was right in reversing the action of the District Court.

Respectfully submitted,

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APPENDIX

Bankruptcy Act, § 77 (c) (6) (11 U. S. C. § 205 (c) (6)):

"'If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49.'"

Massachusetts Special Acts, 1896, c. 516:

AN ACT TO PROVIDE FOR A UNION STATION FOR PASSENGERS ON RAILROADS ENTERING THE SOUTHERLY PART OF THE CITY OF BOSTON.

SECTION 1. Charles F. Choate, William Bliss, William T. Hart, Royal C. Taft, and Charles P. Clarke, their associates and successors, are hereby made a corporation by the name of The Boston Terminal Company, with power to construct and maintain a union passenger station in the southerly part of the city of Boston, and to provide and operate adequate terminal facilities for the several railroad companies hereinafter authorized to hold the stock of said terminal company, and for the accommodation of the public in connection therewith.

SECTION 2. The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

SECTION 3. The immediate government and direction of the affairs of said terminal company shall be vested in a board of five trustees, to be appointed at once on the organization of said company, one of whom shall be appointed by each of said railroad corporations from its directors, to hold office as such trustee at the pleasure of the corporation by whom he is so appointed; any vacancy to be filled in like manner. The trustees shall elect one of their number to be chairman, and may elect another to be vice chairman, and shall choose a clerk who shall be sworn, and a treasurer who shall give bond in the sum required by the by-laws, with surety, for the faithful discharge of his duties.

SECTION 4. Said terminal company, to provide means to carry out the purposes of this act, may from time to time issue coupon or registered bonds, in sums of not less than one hundred dollars each, payable at periods not exceeding one hundred years from the date thereof, bearing interest not exceeding four per cent. per annum, payable annually, semi-annually, or quarterly, to such an amount as may be necessary and as may be approved by the board of railroad

commissioners. No bonds shall be issued unless approved in writing by at least three of the trustees of the corporation. Said corporation may mortgage or pledge as security for the payment of such bonds or of any bonds given in renewal thereof, a part or all of its real estate and other property. In case any mortgage made to secure bonds issued by the terminal company under the provisions of this act shall be foreclosed, and there shall not be thereby realized a sum sufficient to pay all the then outstanding bonds secured by said mortgage, said railroad companies shall be held liable to pay any deficiency in the amount required to pay all of said bonds and the interest thereon in such proportions as may be just and equitable, having regard to the use which they or their lessees may have respectively had of the mortgaged property; and the supreme judicial court shall have jurisdiction in equity to determine such proportions and to compel such payments to be made, so that the full payment of the principal and interests of of bonds issued under the provisions of this act by the terminal company shall not in any event fail. Any such mortgage shall be made to a trustee or trustees approved in writing by the board of savings banks commissioners, and savings banks and institutions for savings may invest in such bonds when so secured.

SECTION 5. Said terminal company may purchase or otherwise take in fee the whole or any part of the land in the city of Boston within the following limits, that is to say: — Beginning at the easterly corner of Atlantic avenue and a way called Summer street, thence bounded by the northerly line of said way extended to Fort Point channel; thence by said channel to Broadway; thence by Broadway to the westerly line of Lehigh street; thence by the westerly line of Lehigh street and by South street, Kneeland street and

the westerly line of Cove street extended to Federal street; thence by the westerly line of Federal street to Summer street, and thence across public ways to the point of beginning; and may discontinue and occupy for its purposes all streets and rights of way embraced within the land so acquired: *provided, however*, that no land belonging to the Boston and Albany Railroad Company or to the Old Colony Railroad Company shall be taken by said terminal company without the consent of the directors of both of said railroad companies; and *provided, further*, that the portion of Federal street to be discontinued under the provisions of this act shall not be closed to travel prior to the completion of the extension of Summer street and the extension of Dorchester avenue hereinafter provided for, and the opening of the same to travel, unless a temporary provision for the travel over such portion of Federal street, so that the travel shall not be interrupted, is provided for in some manner approved by the mayor, such temporary accommodation to continue until the completion of said Dorchester avenue and Summer street, and *provided, further*, that if said terminal company shall take for the purpose of this act any part of the land within the limits before described, owned by the Boston Gas Light Company, it shall take the whole of the land owned by said Boston Gas Light Company within said limits.

SECTION 6. Said terminal company, upon the passage of this act, shall forthwith organize, and thereupon the trustees thereof shall at once prepare plans and specifications for the construction of a union passenger station upon land hereinabove authorized to be taken, adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the companies and of the public, exhibiting its form, dimensions of walls, rooms

and partitions, and arrangements, and its location with reference to the adjacent streets and to the tracks of all said railroad companies located or proposed to be located in the vicinity thereof, and any projections over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval, who shall forthwith approve or disapprove them in writing. The trustees shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require. Said station shall be constructed by the terminal company according to the plans thus approved by the board of railroad commissioners, or as the same may be changed, as hereinafter provided. The supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce the provisions of this section.

SECTION 7. Said terminal company, within three months after the plans of said union station are approved as above-provided, shall file in the registry of deeds for the county of Suffolk a location of the lands hereby authorized to be taken by it, or of such part thereof as it then deems it necessary to acquire, and shall proceed with all reasonable diligence to the construction and completion of such union passenger station according to said plans. But the trustees of the terminal company may from time to time propose to the mayor of Boston any changes in said plans, and the mayor shall forthwith approve or disapprove such changes in writing, and the trustees shall then at once submit such changes to the board of railroad commissioners, who, after notice to the mayor and to the railroad companies, and a

hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require.

SECTION 8. Said terminal company, upon the completion of said union passenger station and grounds, shall make reasonable rules and regulations for their use; and the board of railroad commissioners, upon the application of either of said companies or of the mayor of the city of Boston, and a hearing may, from time to time, make any modification of such rules and regulations which they may deem just and reasonable. Such rules and regulations shall be binding upon all corporations and persons in the use of said station and grounds, and shall be enforced by railroad police officers who may be appointed upon the application of the terminal company, in the same manner and with the same powers in said station and grounds, and with like liability of the terminal company for their acts, as railroad police officers under the general law.

SECTION 9. All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land herein-above authorized to be taken, for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce this provision; but said terminal company may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station hereinafter provided for as may be reasonably necessary for their respective use.

SECTION 10. Said railroad companies hereby required to use said union station shall pay to the terminal company

for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock. Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all of the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies, and the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process.

SECTION 11. In order to render the union station and passenger facilities herein provided to be constructed and maintained by the terminal company accessible and convenient for public use, the following changes shall be made by the board of street commissioners of the city of Boston in its streets and public places, to wit:— Lehigh street between South street and Broadway bridge shall be discontinued; Cove street shall be widened to the width of at least one hundred feet, and extended at the width to which it may thus be widened to Summer street extended as required by this act; all of Federal street between Essex street and Federal street bridge which is not embraced within land which the terminal company is authorized to take, or which is not included in the above widening or extending of Cove street, shall be discontinued; Summer street shall be extended at least one hundred feet in width from Purchase street to the harbor commissioners' line; Dorchester avenue shall be extended over Federal street bridge, and thence laid out at a width of ninety-two feet, upon land which the terminal company shall convey to the city without compensation, substantially parallel with the harbor commissioners' line, to Summer street so extended, and said terminal company shall convey in fee to the city such of its land acquired under this act as may be required by said street commissioners for said widening and extension of Cove and Summer streets, at its actual reasonable cost to said terminal company; Albany street and Broadway, and the bridges thereof over the Boston and Albany tracks, shall be changed so as to enable the two southerly main tracks and two additional main tracks south of them to be extended thereunder to the grounds of the terminal company. Said board of street commissioners shall discontinue, widen, and lay out said

streets in such manner as may be approved by the mayor, and said city shall construct said streets and make said changes in said bridges as above-specified: *provided, however*, that the terminal company shall construct a bridge for the accommodation of foot passengers or a subway from the end of the new Cove street to meet Dorchester avenue at a convenient place, as determined by the railroad commissioners and street commissioners, sitting jointly, whenever said commissioners deem it necessary. The supreme judicial court or any justice thereof shall have jurisdiction in equity to enforce the provisions of this section.

SECTION 12. Said terminal company and the city of Boston may each release to the other any land which may be necessary for the uses of said terminal company, or for public ways or places respectively, upon such terms as may be agreed upon between the trustees of the terminal company and the mayor and the board of street commissioners of said city; and said railroad companies may convey to each other any land or interest in land in Boston owned by them respectively, which it may be found proper to transfer for convenience in the approach to or use of the station and grounds of said terminal company.

SECTION 13. For the purpose of paying any expenses incurred by the city of Boston in carrying out the provisions of this act the city council of said city may from time to time, on the request of the mayor, authorize the city treasurer to issue notes, bonds or scrip of said city to the amount specified in any such request, for a term or terms not exceeding thirty years from the date thereof, provided the sum total of such amounts shall not exceed two million dollars. If the city council shall not within thirty days after a request from the mayor authorize the loan requested, then the city treasurer of said city shall, on the request of the mayor,

issue and sell notes, bonds or scrip of said city, for the purpose of paying such expenses which shall be outside of the debt limit, and shall be for such terms not exceeding five years, as said treasurer shall determine, provided that the amount of said loan shall not exceed two million dollars. All such notes, bonds or scrip, whether inside or outside of the debt limit, shall be negotiable, shall bear interest payable semi-annually, shall be registered or with interest coupons attached, and shall be sold and disposed of in such manner, at such times, at such prices, in such amounts, and at such rates of interest not exceeding four per cent. per annum, as said treasurer may determine; and any premiums received by said treasurer in the sale of any of said notes, bonds or scrip shall, if the notes, bonds or scrip are issued for a term of ten years or more, be paid to the board of commissioners of sinking funds of said city, and be by them placed in the sinking fund for the redemption of the loan created; otherwise they shall be applied to the payment of said notes, bonds or scrip, or to the payment of said expenses, as the mayor may determine.

SECTION 14. The board of street commissioners of the city of Boston shall, within two years after the completion of said union station, assess upon any real estate in the city of Boston which in the opinion of said board receives any benefit and advantage from the location and construction of said union station, Summer street and Cove street, beyond the general advantage to all real estate in said city, a proportionate part of one half of the expense incurred by said city therefor, but in no case exceeding such benefit and advantage: *provided, however*, that said terminal company shall convey in fee to said city all the lands easterly of the westerly line of Dorchester avenue extended, without requiring any compensation therefor, and all the land except the

piece between Purchase street and Atlantic avenue required for the laying out, widening and extension of Cove street and Summer street, at its actual reasonable cost to said company; and the city of Boston shall assume all such assessments which may be assessed upon land of said terminal company, or of either of said railroad companies, held for railroad purposes. Except as otherwise provided in this section, sections two, three, five, six, seven and eight of chapter fifty-one of the Public Statutes shall apply to assessments under this section.

SECTION 15. The Union Freight Railroad Company shall, upon the request of the terminal company or of the mayor of Boston, remove its tracks on Federal street as now existing, and relocate and maintain the same on Dorchester avenue as extended under this act, Summer street extended, or on Cove street and Summer street to Atlantic avenue, or on either of said routes, as they are or shall be established and constructed under the provisions of this act, with the same powers and privileges and subject to the same duties, restrictions and liabilities now existing as to said tracks as located in their present location, upon such locations and in such manner as may from time to time be approved by the mayor, and such relocations thereof shall be filed in the office of the city clerk. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

SECTION 16. The West End Street Railway Company shall, upon the request of the terminal company or of the mayor of Boston, remove its tracks on Federal street as now existing between Summer street and Federal street bridge, and relocate and maintain the same, with all necessary turn-outs and connections on Summer street as extended, on Dorchester avenue as extended and on Cove street as

widened and extended under this act, upon such locations and in such manner as may be from time to time approved by the mayor; and such relocations thereof shall be filed in the office of the city clerk. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

SECTION 17. The New England Railroad Company, for the purpose of connecting its road with the union station herein authorized to be constructed, may extend its road from a point in the city of Boston as near the northerly end of its South Bay drawbridge as it may find practicable, to said terminal company's grounds, and for that purpose may purchase or otherwise take in fee a strip of land not exceeding thirty feet in width through the land and location of the Old Colony Railroad Company, parallel to its main tracks as they may be then located, subject however to the right of the Old Colony Railroad Company to cross the same; and the New England Railroad Company, the Old Colony Railroad Company and the Boston and Providence Railroad Corporation may jointly or separately construct such bridges across Fort Point channel as may be required for the adequate connection of their roads with each other and with the grounds of the terminal company, the plans thereof to be approved by the harbor and land commissioners; and said New England Railroad Company may use the proceeds of bonds issued under its mortgage made the second day of September in the year eighteen hundred and ninety-five, and recorded with Suffolk county deeds on the twelfth day of September in the year eighteen hundred and ninety-five, to pay any expenses incurred by it under the provisions of this act.

SECTION 18. The Boston and Providence Railroad Corporation, for the purpose of connecting its road with the union

passenger station hereby required to be constructed, may extend its road from a point at or near Dartmouth street to said terminal company's grounds, and thus abolish the grade crossing of its road and the road of the Boston and Albany Railroad Company, and for that purpose may purchase or otherwise take in fee within seven years after the completion of said union passenger station, or within such further time as said corporations may with the approval of the railroad commissioners agree, a strip of land on the southerly side of and adjacent to the main tracks of the Boston and Albany Railroad Company as they shall be then established, not exceeding one hundred feet in width; but it shall not take any land of the Boston and Albany Railroad Company within seven feet of the main tracks of the railroad of that company as then existing, without the consent of the directors of that company. And for the purpose of providing a station and facilities for passengers and public accommodation as hereinafter provided, in substitution for its present passenger station and facilities at Park square, which such change of its road to enable it to use the union station will require to be abandoned, the Boston and Providence Railroad Corporation may purchase, or otherwise take in fee, any land within the following limits, to wit:—Bounded by land of the Boston and Albany Railroad Company, Columbus avenue, and Buckingham, Dartmouth, Harwich and Yarmouth streets, and the land now of the Boston and Providence Railroad Corporation, and any other land adjacent thereto, within such limits as the board of railroad commissioners may upon hearing in writing prescribe; and said corporation shall file a location of the land hereinbefore authorized to be taken by it, or of so much thereof as it then deems it necessary to take, in the registry of deeds for the county of Suffolk, within three

months after the plans for such station and facilities are approved as hereinafter provided, and shall thereupon, either alone or with the Boston and Albany Railroad Company, if they so agree, proceed with all reasonable diligence to the construction of a passenger station thereon as herein provided.

SECTION 19. The Boston and Providence Railroad Corporation shall, within six months after said terminal company files its first location of land herein authorized to be taken for the construction of a union passenger station, prepare plans and specifications for the construction of a passenger station and approaches thereto and facilities for passengers and public accommodation, which shall be an adequate substitute for its present passenger station and facilities at Park square, and adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the railroad and the public, exhibiting its form, dimensions of walls, rooms, and partitions and arrangements, and its location with reference to the adjacent streets and to the tracks of all railroad companies located or proposed to be located in the vicinity thereof, and any projection over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval who shall forthwith approve or disapprove them in writing. The Boston and Providence Railroad Corporation shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of the railroad companies require. Said station, approaches and facilities shall be constructed and provided by the Boston and Provi-

dence Railroad Corporation according to the plans thus approved by the board of railroad commissioners, or as the same may be changed as hereinafter provided, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to enforce the provisions of this section. But the Boston and Providence Railroad Corporation may from time to time propose to the mayor of Boston any changes in the plans for said station, approaches and facilities, and the mayor shall forthwith approve or disapprove such changes in writing, and the corporation shall then at once submit such changes to the board of railroad commissioners, who, after notice to the mayor and the railroad companies, and a hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of the railroad companies require.

SECTION 20. The Boston and Providence Railroad Corporation and its lessees, upon the completion of said union station and of the station or stations herein required to be constructed near Dartmouth street, shall abandon the use of their present station in Park square for railroad purposes, and their railroad northerly of the crossing of the railroad of the Boston and Albany Railroad Company near and easterly of Dartmouth street, and the board of street commissioners of the city of Boston shall lay out, and said city shall construct, suitable approaches to said station or stations to be constructed near Dartmouth street, in such directions and as such grades as said board shall deem the public convenience and necessity require, and as the mayor of said city shall approve.

SECTION 21. The Boston and Albany Railroad Company shall contract with the Boston and Providence Railroad

Corporation and with its lessees for the construction or common use of said station and facilities, or for the construction and use of a joint station at or near said point, in accordance with plans and specifications to be prepared and approved in the manner herein-above provided for the preparation and approval of plans for the construction of a station by the Boston and Providence Railroad Corporation, or if it does not so contract, then upon the completion of the union passenger station it shall construct and open for public use a station or stations adequate for the accommodation of the public, at some point or points near Dartmouth street, and for that purpose it may purchase or otherwise take in fee any land within the following limits, to wit: Bounded southerly by the location of the Boston and Albany Railroad Company, westerly by Dartmouth street, northwesterly by land of the heirs of Eben D. Jordan, Trinity place, and land of the Massachusetts Institute of Technology, and easterly by the westerly line of Clarendon street extended. And whenever a station upon the tract of land herein above-described is opened for use, the Boston and Albany Railroad Company may discontinue its present passenger stations at Columbus avenue and Huntington avenue. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

SECTION 22. The Boston and Albany Railroad Company, within six months after the completion of said union station, shall abandon its present location from the southerly line of Kneeland street northerly to Beach street, and shall remove its tracks from the present grade crossing on Kneeland street between Lincoln street and Albany street, and, for the purpose of extending its terminal facilities may, from time

to time, purchase or otherwise take in fee, the whole or any part of the tract of land bounded and described as follows: Northerly by Kneeland street between the westerly side of Utica street and the easterly side of South street; easterly by the easterly line of South street to Lehigh street; thence across and by the westerly line of South street to the southerly line of Harvard street, so-called; southerly by the south line of Harvard street, so-called, to the westerly line of Utica street; and westerly by said line of Utica street to Kneeland street; and may discontinue and occupy for its purposes all streets and rights of way embraced within said limits, and may also take and discontinue any public or private ways within the tract of land bounded by Kneeland street, Albany street, Broadway, Lehigh street and South street.

SECTION 23. The laws of the Commonwealth relating to the taking of lands for railroad purposes, and the location and construction of railroads, and the assessment of damages occasioned thereby, shall be applicable to and govern the proceedings in the taking of land hereby authorized to be taken by said terminal company or by any railroad company, except that the locations shall be filed in the registry of deeds, as herein provided, and in case the parties, including mortgagees, cannot agree upon said damages, upon petition of any such party filed within one year after the taking of the land, in the clerk's office of the superior court for Suffolk county, the same shall be assessed by a jury in that court. But if any owner of land taken and all mortgagees thereof shall elect to have the damages assessed by a commission of three disinterested persons appointed by the court, the court shall appoint such commission to assess said damages, and their award, or the award of the major part of them, when made and accepted by the court, shall be final,

unless either party shall within sixty days thereafter appeal therefrom, in which case the damages shall be assessed by a jury in that court.

SECTION 24. No owner of any land taken under the provisions of this act shall be required to vacate his premises until three months after a location has been filed, taking the land, and the Boston Gas Light Company shall not be required to vacate the whole or any part of the premises now owned or occupied by it until six months after such filing, or until after such further time, not exceeding fifteen months from the time of such filing and notice, as the board of railroad commissioners and the board of gas and electric light commissioners, who are for this purpose constituted a joint board, may, upon the application of either the railroad company or the gas company, made at any time after the passage of this act, after hearing, prescribe in writing.

SECTION 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act.

SECTION 26. This act shall take effect upon its passage.

Approved June 9, 1896.

Massachusetts Acts, 1921, c. 363:

SECTION 1. Section two of chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six is

hereby amended by inserting after the word "Company," in the third line, the words: — its lessee, the New York Central Railroad Company,— and also by inserting after the word "for", in the eighth line, the words: — or purchase,— so as to read as follows:— *Section 2.* The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, its lessee, the New York Central Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for or purchase and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

SECTION 2. During the existence of the lease of the Boston and Albany Railroad to the New York Central Railroad Company authorized by chapter four hundred and sixty-eight of the acts of nineteen hundred, the New York Central Railroad Company shall exercise all the powers conferred upon the Boston and Albany Railroad Company under the provisions of said chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six, as amended.

Approved May 7, 1921.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 120.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of the New York, New Haven and Hartford Railroad Company,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

PETITION OF THE RESPONDENT FOR A REHEARING.

ROBERT H. DAVISON,
Attorney for the Respondent.

OSCAR W. HAUSSERMANN,
EVERETT L. HOLLIS,
of Counsel.

L. H. LANE COMPANY, Law Printers, 221 High Street, Boston.

In the

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 120.

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONERS,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE, RESPONDENT.

PETITION OF THE RESPONDENT FOR A REHEARING.

Comes now the above-named respondent, Webster and Atlas National Bank of Boston, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. This case came before this Court upon certiorari to the Circuit Court of Appeals for the Second Circuit. The case arose from an order entered by the District Court for the District of Connecticut, sitting as a court of bankruptcy in railroad reorganization proceedings under Section 77 of

the Bankruptcy Act. The District Court ordered the trustees of The New York, New Haven and Hartford Railroad Company to withhold payment of taxes assessed with respect to the property of The Boston Terminal Company and payment to the terminal company of the sums requisite for it to pay its franchise taxes and bond interest owed by that company, all claimed to be a part of the statutory compensation for use of the terminal facilities as required by Chapter 516 of the Acts and Resolves of Massachusetts for the year 1896. The petitioner herein, Webster and Atlas National Bank of Boston, trustee under the mortgage indenture securing the bonds of The Boston Terminal Company, contended that these payments were required by the Massachusetts Act of 1896 to be paid by the trustees of the estate of The New York, New Haven and Hartford Railroad Company for current use of the terminal facilities, and that the said trustees were obligated to make such payments not only by virtue of the Massachusetts Act but also because of the provisions of Section 77 (c) (6) of the Bankruptcy Act. The Circuit Court of Appeals declined to pass upon either of these questions but held that 28 U.S.C., Sections 124 and 124 (a) of themselves required the New Haven trustees to make these payments. This Court in its opinion of February 3, 1941 (*Howard S. Palmer, et al.*, v. *Webster and Atlas National Bank of Boston, Trustee*, No. 120, October Term, 1940) held that 28 U.S.C., Sections 124 and 124 (a) were not applicable to the instant case and reversed the judgment of the Circuit Court of Appeals, affirming the judgment of the District Court.

2. This Court in the second last paragraph of its opinion stated that the District Court did not construe the Massachusetts Act of 1896, and that the District Court did not hold that that Court would "not sustain any claim on the part of the terminal company or the State or the City of Boston, against the New Haven estate in respect of the interest on the terminal company's bonds and taxes assessed on its

property and franchises.". This Court further stated that the decision of the District Court was only an exercise of its proper discretion in ordering the withholding of cash payments towards the taxes and interest of the Terminal Company. It is respectfully submitted, however, that the District Court did construe the provisions of the Massachusetts Act of 1896 and did hold that under that Act the obligation of the New Haven and of the New Haven trustees terminated when the New Haven trustees disaffirmed the Old Colony and the Boston & Providence leases (R. pp. 14-15). This Court in its own statement of the holding of the District Court said:

> "The court further held, on an analysis of the Massachusetts statute creating the terminal company, that any direct obligation on the part of New Haven to pay interest and taxes terminated with the rejection of the Old Colony lease which related back to the date of the petition for reorganization, since which time the trustees have not operated for their own account but for that of the former lessors."

This holding, it is respectfully submitted, is a construction of a Massachusetts statute and the affirmation of this Court of the decision of the District Court may be held to be an affirmation of this finding and therefore inconsistent with the language of the second last paragraph of the opinion of this Court.

This Court states in the latter part of its opinion that

> "We are of opinion, as was the District Court, that nothing in Section 77 (c) (6) works the inequitable result that the involuntary operation of the Old Colony, and Boston and Providence properties by the New Haven trustees requires them to advance New Haven's funds, without security, for the payment of obligations of the former lessors which are not essential to the continued operation demanded of the trustees."

It is respectfully submitted that this statement is a construc-

tion of the Massachusetts Act of 1896 holding that the obligation due the Terminal Company for the use of its facilities is the obligation of the former lessors and not that of the New Haven estate or the trustees of the New Haven, even though this Court in the second last paragraph of its opinion purported not to construe the Massachusetts Act of 1896. The petitioner submits that it is inescapable that the opinion of this Court is based upon a holding that the obligations in question are those of the former lessors, the Old Colony and the Boston and Providence. Such a holding can be arrived at only by a construction of the provisions of the Massachusetts Act of 1896. If this Court intended only to decide that it was properly within the discretion of the District Court temporarily to withhold cash payments by the trustees of the New Haven, no construction of the Massachusetts Act is involved. Your petitioner suggests, however, that the language of the opinion of this Court goes far beyond such a finding and incorporates a construction of the Massachusetts Act which leaves your petitioner in doubt as to the proper remedy for the recovery of compensation from some source for the current use and occupation of the property of the Terminal Company. It cannot be stressed too strongly that the obligations due here are not debts of the bankrupt but rather are current operating expenses similar to wages.

In the second last paragraph of this Court's opinion it is stated in effect that the District Court did not and that this Court does not hold that the Massachusetts Act "will not sustain any claim on the part of the terminal company, or the State or the City of Boston, against the New Haven estate in respect of the interest on the terminal company's bonds and taxes assessed on its property and franchises" and that "In any event no question of the validity of any such claim is presented on this record and our affirmance of

the District Court's order is not to be taken as the expression of an opinion upon any such question".

It is submitted that in earlier portions of this Court's opinion this Court holds that no valid claim on the part of the Terminal Company can be sustained against the New Haven estate under the Massachusetts Act on account of use by the Old Colony estate and the Boston and Providence estate of the Terminal Company's facilities. It would appear, therefore, that the only valid claim on the part of the Terminal Company which can be sustained against the New Haven estate under the Massachusetts Act is a claim based upon use by the New Haven estate of the Terminal Company's facilities.

If, as appears from the earlier portions of this Court's opinion, this Court has held that the use in question is by the estates of the Old Colony and the Boston and Providence, it is difficult to escape the conclusion that this Court has in effect, notwithstanding the second last paragraph of its opinion, held that no valid claim under the Act can be sustained on the part of the Terminal Company against the New Haven estate on account of the use in question.

It is submitted that an examination of the opinion of the District Court shows that the exercise of its discretion was based upon that Court's interpretation of the Massachusetts Act and this Court has so stated. Indeed, the District Court in its opinion indicates that it would have exercised its discretion differently had it decided that these obligations were those of the New Haven (R. pp. 15, 17). The petitioner submits that such an exercise of discretion by the District Court founded upon its own unique interpretation of the Massachusetts Act of 1896, a valid law binding upon the New Haven, was beyond the sound discretion of that Court.

Thompson v. *Magnolia Petroleum Company*, 309 U.S. 478 (1940)

3. As already pointed out, this Court states in the latter part of its opinion that:

> "We are of opinion, as was the District Court, that nothing in Section 77 (c) (6) works the inequitable result that the involuntary operation of the Old Colony and Boston & Providence properties by the New Haven trustees requires them to advance New Haven funds without security for the payment of obligations of the former lessees *which are not essential to the continued operation demanded of the trustees.*" (Italics ours.)

It is respectfully submitted that, in determining whether Section 77 (c) (6) of its own force obliged the New Haven trustees to pay to the Terminal Company out of funds of the New Haven estate the amount requisite to enable the Terminal Company to pay the bond interest in question, this Court based its conclusion upon an erroneous assumption of fact. The error consists in assuming that the payment of an amount equivalent to the bond interest in this case is "not essential to the continued operation demanded of the trustees." The clear implication of this holding is that the New Haven trustees may continue to operate into the Boston terminal regardless of the non-payment of the monthly compensation required by the Massachusetts statute.

It is respectfully submitted that this Court overlooked the fact that the District Court limited its holding in this respect to the statement that failure to pay the *taxes* in question on the due date would not result in an interruption of operation. This Court apparently overlooked the fact that the District Court did *not* state that non-payment of other items of compensation, *such as non-payment of the sum required to enable the Terminal Company to pay the bond interest in question,* would not result in an interruption of operation. It is submitted that the non-payment of the sum required to enable the Terminal Company to pay the bond

interest in question has brought about a default under the terms of the mortgage indenture securing the bonds of the Terminal Company, and has created a situation where continued operation into the terminal by the New Haven trustees may well be interrupted if the bondholders exercise the rights given them by the mortgage indenture. Furthermore, the Massachusetts Supreme Judicial Court is specifically empowered to compel payment for the use of the terminal and to devise means for the enforcement of such obligations. Thus the payment of bond interest, though possibly not of taxes, becomes essential to the continued operation by the New Haven trustees into the terminal and the non-payment may result in a serious disruption of the operation of the Old Colony and the Boston & Providence lines involving partial suspension of such operation.

It is submitted that the facts, as revealed by the record of these proceedings, clearly show that the payment of amounts requisite to enable the Terminal Company to pay the bond interest in question is essential to the continued operation of the lines of the former lessors. The facts of the case, being such as they are, give rise to the question whether this Court in this case is construing Section 77 (c) (6) to mean either (a) that current payment for current use of the terminal is "not essential to the continued operation demanded of the trustees" or (b) that, even though payment is essential to continued operation of the leased lines, Section 77 (c) (6) of its own force does not oblige the trustees of the former lessee to make such payment out of the funds of the estate of the lessee if the former lessor has no funds or property out of which the estate of the former lessee could obtain reimbursement on account of such payment.

The opinion of this Court may well result in the use of the terminal by the New Haven trustees without the payment of any compensation for that use and thus throw the burden

of the entire expense of the operation of the terminal upon the Boston and Albany and its lessee, the New York Central Railroad. Such a liability would fall upon the Boston and Albany and the New York Central by virtue of clear provisions of the Massachusetts Act of 1896 (R. p. 9)

4. It is submitted that the language of this Court in the second last paragraph of its opinion apparently leaving open to the petitioner or the Terminal Company its full rights against the New Haven estate is nullified by the opinion itself involving as it must a construction of the Massachusetts Act of 1896. Your petitioner respectfully submits, therefore, that the premise of the opinion of this Court denies the language of the second last paragraph of the opinion; that the rights which this Court purports to leave to the Terminal Company or the State or the City of Boston against the New Haven estate are foreclosed by the opinion itself.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the District Court be, upon further consideration, reversed, or that the opinion of this Court be further clarified.

Respectfully submitted,

ROBERT H. DAVISON,
Counsel for Respondent.

OSCAR W. HAUSSERMANN,
EVERETT L. HOLLIS,
of Counsel.

CERTIFICATE OF COUNSEL.

I, Robert H. Davison, counsel for the above-named Webster and Atlas National Bank of Boston, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

ROBERT H. DAVISON,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 120.—October Term, 1940.

Howard S. Palmer, et al., Trustees of the property of the New York, New Haven and Hartford Railroad Company, Debtor, Petitioners,
vs.
Webster and Atlas National Bank of Boston, Trustee.

On petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 3, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

In proceedings for the reorganization of the New York, New Haven and Hartford Railroad under § 77 of the Bankruptcy Act,[1] the District Court, in response to a petition of the trustees, ordered them to withhold payment of taxes assessed upon the property of Boston Terminal Company and franchise taxes and bond interest owed by the same company.[2] The Circuit Court of Appeals reversed on the ground that statutes of the United States compelled payment by the trustees.[3] The importance of the questions involved, and a conflict of decision,[4] moved us to grant certiorari.

In 1888 Boston and Providence Railroad Corporation leased its property to Old Colony Railroad Company for a term of 99 years. In 1893 Old Colony leased its property, including its leasehold interest in the Boston and Providence property, to New Haven for a term of 99 years. Boston was then served by four railroads entering the city from the South and West: the two lessors, New England Railroad Company, and Boston and Albany Railroad Company.

[1] 11 U. S. C. § 205.

[2] The order also directed the trustees to withhold payment of taxes approximating $613,000 due by Old Colony Railroad Company, and Boston and Providence Railroad Corporation to Massachusetts, and taxes approximating $76,000 due by the same companies to Rhode Island. That portion of the order is not involved in this case.

[3] 111 F. (2d) 215.

[4] See Philadelphia Co. *v.* Dipple, et al., post p. —, —.

In 1896 Massachusetts, by a special act, incorporated The Boston Terminal Company,[5] with power to construct and maintain a union passenger station in the southerly part of Boston, and to provide and operate terminal facilities "for the several railroad companies" by the act "authorized to hold the stock" of the company. The Act sets the capital stock at $500,000, and provides that Boston and Albany, New England, Boston and Providence, Old Colony, "and the New York, New Haven and Hartford Railroad Company, being lessee of Old Colony Railroad Company, may each subscribe for and hold" one-fifth thereof.

The management of the company's affairs is vested in five trustees, one to be appointed by each of the five stockholding companies.

All the named railroads, including the New Haven, are required to use the terminal for all their terminal passenger business in Boston. They are to pay to the terminal company for such use the amounts needed to cover the company's expenses, including interest upon its bonds, and taxes. Each railroad is required to pay in proportion to its use, as agreed amongst them, or, in default of agreement, according to the proportion determined by the railroad commissioners (now the Department of Public Utilities).

The real estate of the terminal company "required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

In 1905 New England was merged into New Haven.[6] Later Boston and Albany leased its property to the New York Central. Thereafter, in 1921, the Massachusetts Act of June 9, 1896, was amended[7] to give the New York Central, as lessee, the right to hold stock of the terminal company and, during the term of the lease, to exercise all the powers by the Act conferred on Boston and Albany. The total use of the terminal thereafter was by New York Central, as lessee of Boston and Albany, by New Haven, as lessee of Old Colony, and by New Haven, as owner of the New England line.

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[5] Act of June 9, 1896, Massachusetts Acts and Resolves, 1896, Ch. 516, p. 520.

[6] Massachusetts Acts and Resolves 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, § 4.

[7] Act of May 7, 1921, Massachusetts Acts and Resolves, 1921, Ch. 363, p. 391.

During the period involved in this case there was no use of the terminal by the New Haven trustees on behalf of the New England line.[8]

In 1931 the Department of Public Utilities of Massachusetts determined that the proportion of use of the union station and facilities was seventy per cent. by New Haven and thirty per cent. by New York Central. No reapportionment has since been made.

New Haven filed its petition for reorganization in the District Court for Connecticut October 23, 1935. At that time the lines of Old Colony and Boston and Providence came into the custody of the court as a part of the New Haven system. The court directed continued operation of the system and appointed trustees. Old Colony filed its petition for reorganization in the New Haven proceeding June 3, 1936, and the court appointed the same persons trustees as had been appointed upon the New Haven petition. Boston and Providence initiated a reorganization proceeding in the District Court for Massachusetts August 5, 1938, and trustees of its property were appointed by that court. The New Haven trustees disaffirmed and rejected the Old Colony lease June 2, 1936, and the trustees of Old Colony rejected the Boston and Providence lease July 19, 1938. Under orders of the District Court for Connecticut, made pursuant to the provisions of § 77(c)(6), the New Haven trustees have continued to operate both Old Colony and Boston and Providence railroads for the account of the former lessors.[9] The trustees have kept their accounts covering the operations of the two lines according to a segregation and allocation of expenses and revenues approved by the Interstate Commerce Commission and by the District Court and confirmed by the Circuit Court of Appeals.[10] In the accounting, the seventy per cent. of the use of the terminal facilities formerly charged to New Haven as lessee is charged by the trustees to Old Colony and Boston and Providence operations in proportion to use.

The trustees' operation of Old Colony and Boston and Providence properties has resulted in losses exceeding $20,000,000 in the

[8] It is asserted by respondent that such use has been resumed, but, if this be the fact, it is irrelevant to any issue in the case. No payment in respect of New England use is in question.

[9] See Palmer *v.* Palmer, 104 F. (2d) 161; Palmer *v.* Warren, 108 F. (2d) 164, affirmed Warren *v.* Palmer, 310 U. S. 132.

[10] Pursuant to § 77(c)(6), 77(c)(10); see Palmer *v.* Palmer, *supra*, Note 9.

period between October 23, 1935, and December 31, 1939. This excess of expenditures over receipts is secured by liens on the properties. Payment of the taxes and bond interest of Boston Terminal Company has required cash advances increasing the accumulating deficit at the rate of approximately $800,000 per annum. The trustees believe that the properties of the lessors are insufficient to secure repayment of further cash advances by the New Haven estate and that to make them will jeopardize the claims of New Haven's own secured creditors. In a petition of October 17, 1939, they set forth the facts and stated their view that they should not make further advances for payment of Boston Terminal taxes and bond interest for the account of the Old Colony and Boston and Providence estates. Notice of hearing was given and a number of interested parties appeared. The District Court announced its opinion and entered an order, October 30, 1939, directing the trustees to withhold the payments in question. Old Colony Trust Company, the trustee under the mortgage of the terminal company, appealed. The appeal was prosecuted in the Circuit Court of Appeals by its successor trustee, Webster and Atlas National Bank, the respondent in this court.

The District Court overruled the contention that § 77(c)(6) imposes an obligation on the trustees of New Haven in behalf of creditors of the lessors. The court held that the section requires the continued operation of the lessors' property, if the lessors are unable to operate, in the interest of the public. It called attention to the fact that the section provides that the operation is to be "for the account of the lessor" and that no claim was made that failure to pay the interest or taxes in question would result in the suspension of operation of Old Colony and Boston and Providence lines. The court further held, on an analysis of the Massachusetts statute creating the terminal company, that any direct obligation on the part of New Haven to pay interest and taxes terminated with the rejection of the Old Colony lease which related back to the date of the petition for reorganization, since which time the trustees have not operated for their own account but for that of the former lessors. The court thought that upon plain principles of equity it ought not to jeopardize the interests of New Haven's secured creditors by imposing the probable loss upon the New Haven estate.

The Circuit Court of Appeals declined to pass upon the question whether § 77(c)(6), of its own force, requires the New Haven trustees to make the payments as operating expenses of the former lessors, though payment is not indispensable to the continuance of railroad operations, and declined to decide whether the direct obligations imposed by the Massachusetts statute upon New Haven bound the trustees of New Haven after rejection of the leases. The court based its reversal of the District Court's order upon two federal statutes.

It held that the Act of June 18, 1934,[11] which provides that "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation . . . . ", lays upon the trustees the obligation to pay the taxes in question. We are unable to agree.

The question is whether the trustees, who are officers or agents appointed by the court to conduct the business of New Haven, are also, within the intendment of the statute, agents who are conducting the business of Old Colony. Stated otherwise, the inquiry is whether, in adopting the statute, Congress had in view an enforced operation of a lessor's property by the trustees of the lessee under § 77(c)(6) to prevent stoppage of railroad transportation. We think Congress had no such intent.

The legislative history of the Act discloses its purpose. The committee reports accompanying the bill which became the Act of 1934 state:[12] "The purpose of this bill is to subject businesses conducted under receivership in Federal court to State and local taxation the same as if such businesses were being conducted by private individuals or corporations." The reports advert to the fact that federal courts had held a federal receiver operating a business exempt from state sales taxes. They conclude: "No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue."

[11] c. 585, 48 Stat. 993; 28 U. S. C. § 124(a).

[12] H. R. 1138, 73d Cong., 2d Sess.; S. R. 1372, 73d Cong., 2d Sess.

What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise. In the light of this purpose, the Act does not impose upon the New Haven trustees the obligation to pay taxes arising out of the conduct of the business of Old Colony or Boston and Providence. § 77(c)(2) accords the trustees of a railroad in reorganization the right to reject burdensome leases. § 77(c)(6) provides that if a lease of a line of railroad is so rejected it shall be the duty of the lessor to operate the line unless it be found impracticable for the lessor so to do, "in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor." The taxes in question are, in the words of the Act of 1934, "applicable to" the business of Old Colony, and Boston and Providence. The New Haven trustees having rejected the Old Colony lease, they are no longer applicable, in any proper sense, to the business of New Haven.

By § 77(c)(2) the trustees of a railroad in reorganization are given power to operate "the business of the debtor". By subsection (c)(4) the trustees are required to file schedules and information disclosing "the conduct of the debtor's affairs". The New Haven trustees' duty is to conduct the business of New Haven. Old Colony petitioned for reorganization and trustees were appointed in that proceeding as "trustees of the property of Old Colony Railroad Company", and were granted, pursuant to § 77, power to operate "the business of Old Colony Railroad Company". The trustees of Old Colony, as such, are the persons who, in the language of the statute, are "authorized by said court to conduct" the "business" of Old Colony.

Upon the petition of a creditor for the reorganization of Boston and Providence, which alleged that company was a common carrier by railroad engaged in the transportation of persons and property in interstate commerce, and that the Connecticut District Court had ordered the operation of its line to be continued by the New Haven trustees for the account of Boston and Providence, and upon the company's admission of the truth of the allegations of the petition, the Massachusetts District Court approved the petition and appointed trustees for the property of Boston and Providence. The appointment was confirmed by the Interstate Commerce Commission

and the trustees are in office. As in the case of Old Colony, these trustees are the persons who are conducting the business of Boston and Providence and not the New Haven trustees.

If the trustees of either of the lessor's properties were able to operate the lines of railroad and from the proceeds of that operation, or from any other source, were in possession of available funds, it would be the duty of the court in view of the Act of 1934 to require them to pay the taxes applicable to the business they are conducting under the orders of the court. But it does not follow that the New Haven trustees, who are not conducting the business of Old Colony or Boston and Providence, as such, but who, under the constraint of § 77(c)(6), are merely operating the lines of those companies to prevent public inconvenience are, in the contemplation of the Act of 1934, conducting the business of the lessors in such sense as to be liable, out of New Haven estate funds, for taxes owed by those companies. It would require very clear and explicit language to evince an intent on the part of Congress to appropriate the moneys of the New Haven estate, which has rejected the Old Colony lease and rid itself of the leasehold interest thereby created, to pay the taxes of its lessor. We find in the Act of 1934 no such clear expression. On the contrary we think it plain Congress did not have in mind, in adopting that statute, any such situation as is created by § 77(c)(6).

The Court of Appeals was of opinion that an obligation is imposed upon the New Haven trustees to pay the bond interest of the terminal company by § 65 of the Judicial Code,[13] which provides:

"Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

The court held the statute applicable by regarding its letter, and, as we think, ignoring its obvious purpose. In the words of the statute, the trustees of the New Haven are "in possession" of cer-

[13] 28 U. S. C. § 124.

tain property belonging to Old Colony, and Boston and Providence. They also are operating that property. Hence the Court of Appeals concluded that the Massachusetts Act of 1896,—a valid law placing upon New Haven an obligation to pay the bond interest of the terminal company,—binds the trustees, so long as they operate the properties, to comply with the New Haven's statutory obligation.

Section 65 is not a new enactment. It has its origin in § 2 of the Act of March 3, 1887[14] and it has frequently been interpreted and applied by the courts.[15] Its obvious purpose was to negative the idea that a federal receiver or trustee could ignore the rules of law of the state of operation affecting the conduct of the business committed to his charge. In this sense it has been interpreted and applied and, in this sense, it is certainly binding upon the trustees of New Haven so long as they operate the property of the former lessors. The application of the Act by the court below goes much farther than this. If valid state laws require a debtor to pay his debts then, under the decision of the Court, such laws bind the New Haven trustees to pay the debts of Old Colony, and Boston and Providence. If this view were correct, the trustees would not be operating the property of those companies for the account of the latter as § 77(c)(6) provides. On the contrary, they would be operating for the account of the New Haven estate. Moreover, on this assumption, the New Haven estate would be compelled to pay the former lessors' debts as they accrued. The result would be a preference of the creditors of the confessedly insolvent lessors as against the creditors of the New Haven whose trustees are operating the Boston and Providence and Old Colony property only under the constraint of § 77(c)(6). We think that to state the proposition is to demonstrate that § 65 of the Judicial Code has no such purpose or effect.

We are of opinion, as was the District Court, that nothing in § 77(c)(6) works the inequitable result that the involuntary operation of the Old Colony, and Boston and Providence properties by the New Haven trustees requires them to advance New Haven's funds, without security, for the payment of obligations of the

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[14] c. 373, 24 Stat. 552, 554.

[15] See e. g. United States *v.* Harris, 177 U. S. 305; Erb *v.* Morasch, 177 U. S. 584; Gillis *v.* California, 293 U. S. 62; Hornsby *v.* Eddy, 56 Fed. 461; Peirce *v.* Van Dusen, 78 Fed. 693.

former lessors which are not essential to the continued operation demanded of the trustees.

How far cash advances to the former lessors should go; whether the security for further advances is adequate; whether advances are necessary to continued operation; are all questions to be decided by the District Court having jurisdiction of the New Haven reorganization proceedings. These are problems of administration to be solved by the exercise of a sound discretion. Upon the uncontested facts, we think the District Court exercised such a discretion in ordering the withholding of further cash payments towards the taxes and interest of the terminal company, and that its order should stand.

The District Court discussed at some length the provisions of the Massachusetts Act of 1896 chartering the terminal company. The respondent insists that the court erroneously construed the Act and held that it will not sustain any claim on the part of the terminal company, or the State or the City of Boston, against the New Haven estate in respect of the interest on the terminal company's bonds and taxes assessed on its property and franchises. The trustees' petition sought an order dealing only with the current administration of the New Haven estate and the District Court need not have decided, and we think did not decide, any question other than that presented. In any event, no question of the validity of any such claim is presented on this record and our affirmance of the District Court's order is not to be taken as the expression of an opinion upon any such question.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.